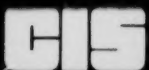


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VERTICAL PRICE FIXING

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST AND RESTRAINT OF
TRADE ACTIVITIES AFFECTING SMALL BUSINESS

OF THE

COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

FIRST SESSION

WASHINGTON, DC, SEPTEMBER 14, 1983

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VERTICAL PRICE FIXING

WEDNESDAY, SEPTEMBER 14, 1983

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ANTITRUST AND RESTRAINT OF
TRADE ACTIVITIES AFFECTING SMALL BUSINESS,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2359, Rayburn House Office Building, Hon. Thomas A. Luken (chairman of the subcommittee) presiding.

OPENING STATEMENT OF CHAIRMAN LUKEN

Mr. LUKEN. We thank you for your attendance. I would like to call to order this meeting of the Subcommittee of Small Business on Antitrust and Restraint of Trade. Today we will be looking into the general subject of vertical price fixing, sometimes known as retail price maintenance.

At a hearing last September, we explored vertical restraints and also enforcement of antitrust statutes by Federal authorities. Since then, the issue of RPM has become somewhat more controversial with the filing of an amicus brief by the Department of Justice in a case pending before the Supreme Court.

The Department is urging the Court to change the standard by which judgments are made about the legality of vertical price agreements. Should the Department's position be upheld, or at least it is urged, it will become more difficult for plaintiffs to win price fixing cases, and defendants will be able to bring additional evidence into trials attempting to justify RPM.

So today we are hoping to hear from all sides of the growing controversy. If we do not, if there are other sides to be heard, we can certainly continue the matter to another day. We are certainly not limiting ourselves to today's proceedings, or to just the issues or matters that are brought up today.

Our scheduled witnesses include representatives of consumers as well as representatives of discount and off-price retail merchants who believe they are denied products because they sell goods at low prices.

As I say, if there are other witnesses from retailers or manufacturers, or others who are complained against in today's hearing, who wish to present evidence at a later time, it would be the intention of the subcommittee to accommodate them and we would like to hear from them.

Finally, we will hear from representatives of the Department of Justice and the FTC whose views may differ from the positions taken by former officials and by other witnesses.

The subcommittee has a continuing interest in the enforcement of the Nation's basic antitrust laws which govern economic behavior in our free enterprise system. Those laws are designed to protect consumers and small businesses from illegal and unfair practices.

The antitrust statutes help to ensure fair competition and thus protect all Americans from artificially high prices and from limited supply.

Today's hearing will help us determine whether changes in law which are suggested will be beneficial or detrimental to competition and to the Nation's small businesses.

The gentleman from California is present.

Mr. Chappie, did you have an opening statement?

Mr. CHAPPIE. No, thank you, Mr. Chairman.

Mr. LUKEN. All right, we will proceed. We thank you all for coming on time. Starting at this rather early hour, we will be able hopefully to get some of our business in without competition from the floor of the House, which will go into session at 10 a.m.

The first witness on our list this morning is Timothy Muris, Director of the Bureau of Competition of the Federal Trade Commission, who is already in the witness chair.

Thank you for coming, Mr. Muris. We have your prepared statement which has been filed, and without objection, it will be received. You may proceed in any manner which you think will be helpful to us.

TESTIMONY OF TIMOTHY J. MURIS, DIRECTOR, BUREAU OF COMPETITION, FEDERAL TRADE COMMISSION

Mr. MURIS. Thank you, Mr. Chairman. I am certainly pleased to be here to discuss the views of the Bureau of Competition on the issue of vertical restraints. I was recently appointed Director of the Bureau of Competition at the Commission. I am speaking today on my own behalf and on the Bureau's behalf. The views that I have are not necessarily those of the Commission itself or any individual Commissioner.

I would just like to summarize briefly the points made in my testimony and I appreciate your putting the entire statement into the record.

Mr. LUKEN. We are not suggesting that you limit yourself timewise, though.

Mr. MURIS. All right.

Mr. LUKEN. But you do not have to follow your prepared testimony.

Mr. MURIS. Thank you, Mr. Chairman.

I really wanted to make three brief points before addressing any questions that you might have. First, I would like to discuss the historical setting of legal doctrines regarding vertical restraints. Second, I would like to discuss the policies and programs of the Bureau of Competition regarding those restraints. Finally, I would like to discuss the effect of vertical restraints on small business.

Concerning that historical setting, Congress, the courts, and the FTC have never achieved stable rules regarding vertical restraints. To the contrary, legal doctrines have swung from one extreme to another.

Congress has had little direct input regarding the vertical restraints doctrines applied in the case law. Rather the antitrust enforcement agencies and the courts have shaped that law.

Although the courts developed what later was called a per se rule against resale price maintenance beginning with the Supreme Court's 1911 *Dr. Miles* decision, they immediately began a swing in the opposite direction shortly after that opinion.

Regarding so-called nonprice vertical restraints, the courts first held them to be per se violations. But in 1977, they reversed this course in the *Continental TV v. GTE Sylvania* opinion.

Although the logic of the *Sylvania* case is inconsistent with the per se rule against resale price maintenance, the courts stated that nonprice and price restraints were to be treated differently.

Economic and legal analysts have been increasingly critical of the per se rule, and several lower court decisions have evidenced a reluctance to apply the per se standard to vertical arrangements relating to price.

This whole controversial, and I think convoluted in its legal nature, issue is now before the Supreme Court in the *Monsanto* case, which you mentioned, Mr. Chairman.

Thus, we have had no stable, coherent, defensible legal standards governing vertical restraints. The pendulum has swung from the fair trade laws that permitted resale price maintenance even when such price maintenance hurt consumers to per se illegality, even when vertical restrictions helped consumers.

What has been missing is an economically sound doctrine that prohibits vertical restraints that hurt consumers, and permits vertical restraints that help consumers.

I would like to turn now to the policies and programs of the Bureau of Competition, and make two points.

First, to expand our understanding of the effects of vertical restraints, we created a combined task force between the Bureaus of Competition and Economics. That task force is continuing its examination of the available theoretical literature and empirical vertical restraints evidence to determine the optimum policy or enforcement regarding vertical restraints.

Second, within the Bureau of Competition, I have created a task force to examine ongoing investigations involving direct or indirect vertical restraints. The purpose of the task force is to identify those restraints that injure consumers.

Whenever such vertical restraints are identified, I expect to recommend to the Commission the issuance of an administrative complaint. Indeed, we will soon send to the Commission a complaint accompanied by a signed consent agreement that would require a trade association to cease coercing manufacturers to stop selling to discounters whose prices the trade association members did not like.

I think that it is a particularly significant consent agreement, in that much of the recent furor over discounters involved just such a situation, where the discounters were allegedly terminated by their

manufacturer because competitors of the discounter allegedly did not like the discounter's pricing policies.

Finally, let me discuss the effect of vertical restraints on small businesses. Although the primary purpose of the Federal Trade Commission is to protect consumers, we are aware of the effect of FTC enforcement policies on small businesses. Small businesses are vital to our economy in creating new jobs, providing spurs to innovation, and in stimulating competition.

Significantly, vertical restraints can, under some circumstances, be critical to the viability of smaller manufacturers and smaller distributors. For example, a new small manufacturer may find that it cannot obtain needed distributors unless it is prepared to provide a guaranteed markup.

This might be accomplished through territorial restrictions, so that the distributors can be assured that they will not face competition from other sellers of the same product.

Alternatively, a markup can be guaranteed through resale price maintenance. Under the current status of the law, the territorial restrictions would be evaluated under the so-called rule of reason. And in the case of a new entrant, it would almost certainly be found legal.

By contrast, a flat per se rule regarding resale price maintenance would prohibit the second alternative. This outcome would be perverse, because under these circumstances the resale price maintenance would be better for the manufacturer and for consumers.

I also think that it would be better for other distributors, because in the situation that I just outlined the resale price maintenance would enable more distributors to sell the product.

Vertical restrictions can be especially important to some small distributors. For some products, point-of-sale and postsale services are critical. In many cases, consumers are receiving information as well as a product.

For example, I have recently been interested in purchasing a stereo. Not being an expert on stereos, I visited several shops that explained at great length the various benefits and advantages of competitive brands. As you can see, I was receiving information when I entered those shops.

For such products, failure to provide the information consumers need will mean reduced sales. Significantly, many large stores are ill-equipped to provide point-of-sale and postsale services.

By contrast, small businesses are often well-equipped to provide such services. If manufacturers are not permitted to limit distribution to distributors that are able and willing to provide the needed services, consumers will be harmed as output is reduced. The remaining output must shift towards large distributors, which will harm small businesses.

Fortunately, it appears that an enforcement strategy that focuses on consumer welfare is also best calculated to protect the interests of small business.

On this encouraging note, I conclude my remarks. I would be pleased to address any questions that you might have.

[Mr. Muris' prepared statement follows:]

PREPARED STATEMENT OF TIMOTHY J. MURIS, DIRECTOR, BUREAU OF COMPETITION,
FEDERAL TRADE COMMISSION

Mr. Chairman and members of the Subcommittee, good morning. My name is Timothy J. Muris. I am Director of the Bureau of Competition at the Federal Trade Commission. It is a pleasure to appear at these hearings to discuss the Bureau of Competition's position on resale price maintenance. I would like to address three general topics: (1) the historical setting of legal doctrines regarding resale price maintenance and other vertical restraints; (2) the policies and programs of the Bureau of Competition regarding resale price maintenance; and (3) the effect of vertical restraints on small business. I should emphasize at the outset, however, that I am presenting solely my own views, and my remarks do not necessarily represent the views of the Commission itself or any individual Commissioner.

Background of Legal Doctrines Governing Vertical Restraints

Congress, the courts, and the FTC have never achieved stable rules regarding vertical restraints. To the contrary, legal doctrines have swung from one extreme to another.

Congress has had little direct input regarding the vertical restraints doctrines applied in the case law. Rather, the antitrust enforcement agencies and the courts have shaped the law. The antitrust enforcement agencies properly perceived the anticompetitive potential of resale price maintenance. The efficiency-enhancing potential of vertical restraints was not understood, however, until long after the applicable legal rules were developed. Accordingly, responding to the initiatives of

prosecutors and plaintiffs, the courts developed a per se rule against resale price maintenance, beginning with the Supreme Court's 1911 Dr. Miles decision.^{1/}

Apparently sensing that a per se rule went too far, a swing began in the opposite direction shortly after the Dr. Miles decision. The courts upheld resale price maintenance carried out through agents.^{2/} The courts also upheld the right of manufacturers to select their customers and to announce the basis upon which they would agree to sell.^{3/} Congress even authorized "fair trading" in states that passed enabling legislation.

In the 1960's, a second pendulum swing occurred with regard to non-price vertical restraints. In Schwinn,^{4/} the Supreme Court held non-price vertical restrictions to be per se violations (while creating an exception for nonsale transactions). Pressure soon arose to move the pendulum in the other direction. Economists by this time better understood the consumer-benefitting potential of vertical restrictions. In addition, lower courts balked at the Schwinn decision and began to create exceptions. The pendulum returned more nearly to a

^{1/} Dr. Miles Medical Co. v. John D. Park & Sons, Co, 220 U.S. 373 (1911).

^{2/} United States v. General Elec. Co., 272 U.S. 476 (1926).

^{3/} United States v. Colgate & Co., 250 U.S. 300 (1919).

^{4/} United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967).

center position in 1977 when the Supreme Court, in the Continental T.V. v. GTE Sylvania ^{5/} decision, reversed Schwinn.

In the area of price restraints, the legal picture has been more confusing. In 1975, Congress repealed the fair trade statutes,^{6/} taking the issue of pricing restraints away from the states and returning the issue to the courts. Although the logic of the 1977 GTE Sylvania decision is inconsistent with a per se rule against resale price maintenance, the Court stated that nonprice and price restraints were different. Economic and legal analysts have been increasingly critical of a per se rule. Several lower court decisions have evidenced a reluctance to apply the per se standard to vertical arrangements relating to price.^{7/} The issue of per se illegality is before the Supreme Court in the Monsanto v. Spray-Rite case.^{8/}

In short, during the past three-quarters century we have had no stable, coherent, defensible legal standards governing vertical restraints. The pendulum has gone to both extremes.

^{5/} Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36.

^{6/} Consumer Goods Pricing Act of 1975, 89 Stat. 801, amending 15 U.S.C. §§ 1, 45(a).

^{7/} See, e.g., Mesirow v. Pepperidge Farm, Inc., 1982-83 Trade Cas. (CCH) ¶ 65,164 (9th Cir. Jan. 25, 1983); AAA Liquors, Inc. v. Joseph E. Seagram & Sons, Inc., 1982-83 Trade Cas. (CCH) ¶ 65,075 (10th Cir. Dec. 3, 1982), cert. denied, U.S. Sup. Ct. No. 82-1512 (May 2, 1983); Bruce Drug, Inc. v. Hollister, Inc., 1982-2 Trade Cas. (CCH) ¶ 64,941 (1st Cir. Sept. 8, 1982); Eastern Scientific Co. v. Wild Heerbrugg Instruments, Inc., 572 F.2d 883 (1st Cir. 1978).

^{8/} Monsanto Co. v. Spray-Rite Serv. Corp., 684 F.2d 1226 (7th Cir. 1982), cert. granted. 51 U.S.L.W. 3633 (___ U.S. ___) (No. 82-914).

Fair trade laws permitted resale price maintenance, even under conditions when rpm injured consumer welfare. A per se illegal rule prohibited even those vertical restrictions that enhance efficiency and help consumers. What has been missing is the development of economically-sound doctrines that prohibit vertical restraints that injure consumers and permit vertical restraints that benefit consumers.

The Policies and Program of the Bureau of Competition

I would like to turn now to the policies and program of the Bureau of Competition. Congress has empowered the Commission to strike down "unfair methods of competition" and to issue administrative complaints when it is in the interest of the public. The Commission's mandate is consumer-oriented. Congress intended that the Commission be "a body specially competent . . . by reason of information, experience and careful study of the business and economic conditions of the industry affected,"^{9/} and a "body of practical men thoroughly informed in regard to business situations, so as to eradicate evils with the least risk of interfering with legitimate business operations."^{10/}

^{9/} S. Rep. No. 597, 63d Cong., 2d Sess. 9 (1914).

^{10/} Statement of the Managers on the Part of the House to the Report of the Conference, H.R. Rep. No. 1142, 63d Cong., 2d Sess. 19 (1914).

To expand our understanding of the effects of vertical restraints, we created a combined task force with the Bureaus of Competition and Economics. This task force is continuing its examination of available theoretical and empirical vertical restraints material to recommend an optimal enforcement policy towards vertical restraints.

In addition, within the Bureau of Competition, I have created a task force to examine ongoing investigations involving direct or indirect vertical restraints. The purpose of the task force will be to identify those restraints that injure consumers. The circumstances under which vertical restraints are likely to be anticompetitive and injure consumers are now well understood. Vertical restraints are likely to harm consumers by reducing output when used to support either a manufacturers' cartel or a cartel of dealers selling competing brands. Whenever output restricting vertical restraints are identified -- restraints that injure consumers, I expect to recommend issuance of an administrative complaint. Indeed, we will soon send to the Commission a complaint, accompanied by a signed consent agreement, that would require a trade association to cease coercing manufacturers to stop selling to discounters whose prices the trade association members did not like.

Effect of Vertical Restraints on Small Business

Although the primary purpose of the Federal Trade Commission is to protect consumers, we are not unmindful of the effect of

FTC enforcement policies on small businesses. Small businesses are vital in manufacturing as well as in distribution and are especially valuable to our economy in creating new jobs.

Significantly, vertical restraints can, under some circumstances, be critical to the viability of smaller manufacturers and smaller distributors. A new, small manufacturer may find that it will not be able to obtain needed distributors unless it is prepared to provide a guaranteed markup. This might be accomplished through territorial restrictions -- so that distributors can be assured that they will not face intrabrand competition. Alternatively, a markup can be guaranteed through resale price maintenance. Under the current status of the law, territorial restrictions would be evaluated under a rule of reason and, in the case of a new entrant, would almost certainly be found legal. By contrast, a flat per se rule regarding resale price maintenance would prohibit the second alternative. This outcome would be perverse, because, under these circumstances, resale price maintenance would be better for both the manufacturer and for consumers.

Vertical restrictions can also be important for some small distributors. For some products, point-of-sale service and post-sales service are critical. In many cases, consumers are receiving information as well as a product. For such products, failure to provide the information consumers need will mean reduced sales. Significantly, many large stores are ill-equipped to provide point-of-sale and post-sales service. By contrast, small businesses are often well-equipped to provide such

service. If manufacturers are not permitted to limit distribution to distributors that are able and willing to provide the needed services, output will be reduced (injuring consumers) and remaining output will shift towards large distributors (injuring small businesses).

Conclusion

The three areas my testimony covers can now be drawn together. In the past three-quarter's century, antitrust policies regarding vertical restraints has swung from one extreme to another. "Fair trade" laws have been overly permissive. Per se rules have been overly restrictive. A satisfactory balance can be struck by focusing upon the effect of vertical restraints on consumer welfare. To be faithful to its Congressionally-given mandate, the FTC should use its legal and economic resources to identify and eradicate those vertical restraints that injure consumers. Fortunately, it appears that an enforcement strategy that focusses on consumer welfare is also best calculated to protect the interests of small business. On this encouraging note, I conclude my statement. I would be pleased to address any questions that you might have.

Mr. LUKEN. Thank you, Mr. Muris, for your helpful comments. Obviously, this is a difficult area, and one of intense controversy. You state in your testimony that a task force has been created, that you have established a task force. In the interim before the task force returns its recommendation on enforcement, what is your policy, could you describe that?

Mr. MURIS. Our vertical restraints policy is the same as it is in all areas. We seek to maximize our scarce enforcement resources in a way that will best implement the law and protect the major beneficiaries of that law.

Mr. LUKEN. Do you intend to bring any cases, or do you intend to wait?

Mr. MURIS. Oh, no, we intend to bring cases, and we have several investigations ongoing. The trade association case that I mentioned is an example of a case that addresses the major focus of the problem as we see it now.

Mr. LUKEN. That case that you mention, is it in your prepared statement?

Mr. MURIS. I mentioned it in the prepared statement. But since it is a nonpublic matter and not through the Commission yet, I did not mention any names or any great details.

Mr. LUKEN. Without going into names, what is the nature of that case again?

Mr. MURIS. The nature of the case is similar, and indeed identical in most respects, to many complaints that we are receiving. You have discounters on the one hand who compete with firms who are not discounters. The discounters in the complaints that we are receiving are alleging that they are being terminated because their nondiscounter competitors are coercing manufacturers not to deal with the discounters.

I think that it is also asserted that——

Mr. LUKEN. You are investigating cases of this kind?

Mr. MURIS. Several cases of this kind. In one case we have entered into a consent agreement with the nondiscounter competitors where they have agreed to stop coercing the manufacturers to refuse to sell to the discounter.

Mr. LUKEN. These all refer to actual agreements or actual contacts between the nondiscounters and the manufacturer?

Mr. MURIS. Yes, sir. Now many cases that come to us——

Mr. LUKEN. What standards did you use in that case where they took the consent agreement?

Mr. MURIS. Well——

Mr. LUKEN. Did you take the per se approach; I do not want to lead you, but what approach?

Mr. MURIS. Well, the approach we took is the approach we would take in any case. If the case had gone to court, and we thought that we could argue under applicable law that it was per se illegal, that is what we would have done. And in the trade association case, we probably could have.

In terms of deciding whether to investigate such a case and put our enforcement resources in it, and whether a case makes sense for the Commission to pursue, we look at what our statute requires us to look at, which is the public interest. We try to exercise the discretion that Congress permits us in determining whether pursu-

ing a case is an appropriate use of our resources. And for a variety of reasons, I thought that was an appropriate use of our resources.

Mr. LUKEN. It all sounds like a rather subjective test.

Mr. MURIS. No; I do not think——

Mr. LUKEN. You may be well describing the current law, and others may disagree with you.

But does this not leave you in the position which has been charged in many cases of being the prosecutor, judge, and jury occupying all of those roles, since the only standard you have to follow is whether it is in the public interest?

Mr. MURIS. There is no doubt a problem with the Federal Trade Commission Act. One of the reasons Congress perhaps put the so-called public interest test into our statute is that the Commission was created as a prosecutor, judge, and jury, and it was created as a body of experts.

Under general antitrust principles we should apply standard antitrust doctrine, which requires evaluation of the effect of the activity upon consumers.

There is a standard economic discipline known as price theory or microeconomics. Many economists and lawyers developed this doctrine. Though it may sound abstract, it has fairly well understood contours.

Mr. LUKEN. Is the development of that philosophy what leads you to the rule of reason?

Mr. MURIS. In general, antitrust law applies the so-called rule of reason. There are some exceptions where the courts have decided that an activity is so unlikely to benefit consumers that it is said to be per se illegal.

Mr. LUKEN. You mentioned in your testimony that you would bring a case whenever there is harm to consumers, and you specifically cite the instance of a dealer cartel where competing brands are involved.

If all of the Chevrolet car dealers or Plymouth car dealers charged the identical markup, for example, would you feel the same?

Mr. MURIS. No doubt there are circumstances under which restraints in intrabrand competition can cause problems, and we would proceed. But it is important to recognize what the Supreme Court said in *GTE Sylvania*. The primary concern of the antitrust laws is competition between different brands, not intrabrand competition.

Mr. LUKEN. *GTE Sylvania* was based on the factual situation of nonprice restraints, was it not?

Mr. MURIS. Well, I think——

Mr. LUKEN. I am asking. That is not a loaded question. I wish that I knew more about the subject.

Mr. MURIS. In my opinion, the current nonprice/price distinction is not a stable equilibrium and is not a tenable one. Look at what is happening in the circuit courts. The circuit courts are seriously split over just when is something a price restraint and just when is something not a price restraint.

I cited several cases in my testimony where there was a restraint that clearly affects price. Indeed, in a couple of cases, the circuit

courts admitted that it was a price restraint, but the courts refused to apply the per se rule.

The reason that the courts did so was because they recognized that under the logic, if not the explicit language of footnote 18 of the *GTE Sylvania* opinion, price restraints and nonprice restraints are not to be treated differently.

But until the Supreme Court comes up with a coherent basis to distinguish between price and nonprice restraints, we find ourselves in a very tricky situation.

Mr. LUKEN. How do you feel about the proposition that a business person has a right to refuse to deal with whomever he or she chooses, who may announce in advance that that business person will refuse to sell to discounters, what would be your reaction to that?

Mr. MURIS. Under applicable law that practice is legal within fairly narrow parameters. And I think it is sound public policy to allow manufacturers to be able generally to set certain restrictions on the way their products are sold.

At least I think it is sound public policy that those restrictions not be condemned out of hand. But we ought to look to see if those restrictions are part of an overall greater problem. For example, if the manufacturer has market power, it may cause problems. Or if the manufacturer is colluding with other manufacturers, there may be problems.

Or if the manufacturer is imposing the restraint as a result of coercion by competitors of the discounter, there may be problems. But I think that a blanket condemnation of such restraints is neither legally merited under current law nor economically merited.

Mr. LUKEN. So if a retailer publicly states that that retailer will only buy those brands which are marketed in a way that is consistent with the retailer's desire, to carry prestigious clothing for example, that type of announcement would not be illegal in itself?

Mr. MURIS. If that was all that was going on, and there were none of the other factors that I listed, the Government or a private plaintiff would be extremely hard pressed to win a case.

Mr. LUKEN. How does advertising enter into this picture: Is it valuable or is it not for the consumers that some of the major retailer outlets consistently advertise the availability of that merchandise?

Mr. MURIS. Yes, sir.

Mr. LUKEN. And customer services, sales assistance, all of those, would you put them on a par or in the same category?

Mr. MURIS. When consumers purchase a product, as with my stereo example, they are purchasing more than the finished product. There is more to selling a product than just its price.

Advertising is important. Point-of-sale services are important. Manufacturers try to take that into account. But if a manufacturer decides that point-of-sale services are vitally important and sets up a distribution system that provides consumers with these services, and the consumers do not want them, and the manufacturer has viable competitors, then the manufacturer will be penalized by the market. The market will make its judgment, and consumers will decide that they do not want those services; all they want is the

lower price, because if you provide those services, you obviously have to charge a higher price.

Mr. LUKEN. Are there consumer groups or other groups who find fault with the policies as you stated them today?

Mr. MURIS. Yes. I think a lot of what is going on is an attempt by various people to generalize the practices that exist out there as per se illegal, and I think that that is inaccurate.

There is a rule that price restraints are per se illegal, and there are some things that could be clearly regarded as price restraints. Because private actions are such an easy way to police those price restraints, I think there are very few, if any, obvious cases of resale price maintenance that exist.

What we commonly have are situations that are in a much grayer area. What we have are situations where a discounter is terminated, and the discounter claims that it is because of his prices. The manufacturer claims that it was for other reasons.

But if you look at the *Sylvania* opinion, which allegedly dealt with nonprice restraints, it is clear that the restraints that the *Sylvania* opinion endorsed were restraints that affect price. In other words, the *Sylvania* opinion said that in selling television sets, a manufacturer might want his dealers to provide a lot of special services, showrooms, demonstrations, and things like that.

Mr. LUKEN. Services?

Mr. MURIS. That is correct, sir. Those services cost money. A discounter that does not provide those services could be prevented, under the logic of the *Sylvania* opinion and if the manufacturer does it right, from receiving distribution.

So you have this very gray area between price and nonprice. There are a lot of people trying to claim that certain practices are obviously resale price maintenance. But the cases that we are seeing are much more complicated than that.

Mr. LUKEN. The gentleman from California.

Mr. CHAPPIE. No questions.

[Pause.]

Mr. LUKEN. I will ask counsel if there are any questions.

Mr. SABBATH. Mr. Muris, instead of creating a price fixing scheme of resale price maintenance, is it not conceivable that a business under *Sylvania* could establish a contractual relationship with dealers, and require them to provide nice showrooms, good service, and the like, that they would not have to resort to a resale price maintenance program?

Mr. MURIS. Yes. There is no doubt that there are alternative ways to reach the same end. But I think that for certain manufacturers a price maintenance program may have some advantages.

First, requiring by contract every nuance of service competition can be difficult, and hard to police. However, if you require them to sell at a certain price, and if they are in competition with other dealers, and if they cannot compete in price, competition will force them to compete on service.

Second, if you use a price maintenance scheme, as opposed to a territorial or transshipment scheme, you can more easily maximize I think, the number of dealers. From the standpoint of consumers, distributors, and manufacturers, price maintenance schemes can have advantages in some circumstances.

Mr. SABBATH. But, if you go to a price maintenance scheme, is the manufacturer guaranteed that the additional revenues will go to additional services rather than into the revenue or profit of the individual dealer?

Mr. MURIS. No, he is not guaranteed. But if the manufacturer is himself in competition with other manufacturers, or if the manufacturer sets up other dealers to compete with that dealer, then competition is going to force the dealer who cannot now compete on price to compete on something else.

That something else will presumably, or I think almost necessarily, be the services, if the manufacturer has guessed right, and that is what consumers want.

Mr. SABBATH. And would that also assume that other competing dealers, competing manufacturers, did not impose price programs on their dealers as well?

Mr. MURIS. I would be quite concerned about a program of industrywide resale price maintenance. I would have a problem there.

Mr. SABBATH. If you have competing brands, interbrands, and both of those competing brands impose resale price maintenance programs, you may lead to a horizontal problem, is that not correct?

Mr. MURIS. Yes, and that was the point that I was trying to make.

Mr. LUKE. Thank you, very much, Mr. Muris. I think that is about the depth to which we can go into the questions today. I think that we will hold the record open, since you have been the first to testify. I think that it will provide a good basis for our hearing or hearings, however we go into it.

We will hold it open in the event that there are witnesses who bring up specifics that raise questions that we may want to address to you. And I am sure that you will be satisfied if we direct those questions to you in writing.

Mr. MURIS. Thank you, Mr. Chairman.

Mr. LUKE. We may do that. So thank you, very much.

Mr. MURIS. Thank you, sir.

Mr. LUKE. All right. I think that we may be lucky enough to avoid a vote here. It is 10:05.

Is Barbara Warden, executive director of the National Consumers League here?

Ms. WARDEN. Yes, Mr. Chairman.

Mr. LUKE. Ms. Warden, you have been kind enough to submit a prepared statement, that statement will, without objection, be received into the record. You may proceed in any way you see fit.

TESTIMONY OF BARBARA F. WARDEN, EXECUTIVE DIRECTOR, NATIONAL CONSUMERS LEAGUE

Ms. WARDEN. Thank you, very much, Mr. Chairman.

Chairman Luken, and members of this very important subcommittee, my name is Barbara Warden, and I am executive director of the National Consumers League. I want to thank you for extending an invitation to the league to testify before the subcommittee on the subject of resale price maintenance.

As you know, for more than 80 years, the league has been a leader in advocating change in the social and economic conditions of our country to benefit the consumer and worker. Since its founding in 1899, the league has consistently fought for worker and consumer rights, and for the effective enforcement of laws that protect and ensure those rights.

In working to advance policies that strengthen consumer buying power and increase consumer information, access, and choice in goods and services, the league has always been a staunch defender of competition and other principles of a free economy, virtues which we would have expected to be cherished by this administration.

It certainly seems to be an odd twist of fate that this administration which prides itself on being the strongest advocate of our free market competitive system will leave a record of disabling a long-standing public policy which has succeeded in spurring competition in the retail industry. Yet, this administration's efforts to breathe new life into resale price maintenance may very well leave them with precisely that distinction.

For years, the Supreme Court, the Congress, and prior administrations have been unanimous on the issue of resale price maintenance, condemning it as one of the most serious, pernicious, and costly of all antitrust violations. The practice of restrained trade, and inhibited competition, and has artificially inflated prices for consumers.

Since 1911, the Supreme Court in a wide variety of cases has held resale price maintenance to be a per se violation of our antitrust statutes. With price competition being at the foundation of our economy, the Court has steadfastly concluded that a private agreement which interferes with setting of prices by free market forces was illegal on its face, and has found no need to inquire into the reasonableness of the rates fixed or the motivation behind the price fixing. On this matter, the law is clear without any room for doubt.

The Miller-Tydings Act of 1937 provided an exemption to the States from Federal antitrust laws, enabling them to establish fair trade laws, and thereby allow manufacturers to engage in vertical price fixing. Recognizing that the Miller-Tydings Act increased consumer prices, aggravated inflation, and retarded the growth of efficient forms of retailing and distribution, the Congress with the support of the Ford administration passed the Consumer Goods Pricing Act of 1975 which effectively repealed Miller-Tydings.

The repeal of Miller-Tydings gave rise to an astounding expansion in the off-price retail industry. Comprised of general merchandise discounters, variety stores, catalog showroom stores, drug stores, specialty discounters, and factory outlets, the off-price retail market has become a thriving industry with sales easily exceeding \$100 billion annually and forecasts of continued and sustained growth.

With discounting becoming a common practice for records, books, clothing, food, groceries, stereos, radios, luggage, toiletries, and innumerable other consumer items, the prices for these goods dropped dramatically, and consumers have responded with overwhelming approval. Consumers were speaking out loudly and clear-

ly on the issue of resale price maintenance, and they were doing so with a voice that reverberates most strongly, their pocketbooks.

The public wants quality and value in the products they buy. They look for ways to stretch the purchasing power of a shrinking dollar, they count pennies, comparison shop, save coupons, shop for bargains, and look for sales. This is especially true in the past 2 or 3 years during the time of a very severe recession.

They have become increasingly smart shoppers demanding choice and accountability in products for the best price available. Off-price retailing met a huge consumer demand, and provided savings on a great variety of everyday items. It has been estimated that consumers have realized over \$2 billion in savings since the repeal of the Miller-Tydings Act.

For many, during this current recessionary period, discount stores are not just an option, but they are a family salvation, offering a way to buy goods that many consumers could not afford at suggested retail prices.

Is it any wonder that the areas of the country in which discount stores are doing their best are those areas which have been hit hardest by the recession?

Suffice it to say that small business provides the largest bulk of jobs for our citizens, and that a healthy and vigorous small business sector is essential to maintain our national strength and vitality.

The administration's principal antitrust enforcement officials, Assistant Attorney General William Baxter and Federal Trade Commission Chairman James Miller, have ignored the per se illegality of vertical price fixing. Not only have they not brought any new vertical price fixing cases against companies charged with price fixing, but they have also undertaken a campaign to change the antitrust laws by joining with companies accused of unlawful restraint of trade in petitioning the Supreme Court to remove the per se prohibition against vertical price fixing.

Their actions have fostered a climate in which illegal price fixing is spreading. In effect, they have given price fixers tacit approval for their price fixing activities. It matters little that resale price maintenance is illegal when the agencies charged with enforcement will not actively enforce the law and are determined to restore resale price maintenance.

The clear signal that they have issued to manufacturers has contributed to the resurgence of illegal resale price maintenance practices. Many small business persons are becoming the victims of resale price maintenance or are subject to coercive conduct by their suppliers.

The pet economic theory espoused by the administration's chief antitrust enforcers maintains the existence of the free rider which is lurking behind the scene of every successful discount operation.

As the theory goes, all dealers should be forced to charge the same price for the same item, or discounters will be able to lower prices because they will do away with services like fancy showrooms, informative salespeople, and extensive point-of-sale advertising.

Consumers will then go to the full-service retailer, take advantage of all of these services to find out about a product, and then

buy the product from the discounter who is catching a free ride on the services provided by his or her competitor. It is a specious proposition to suggest that discounters are successful because they get a free ride. For most items that would be subject to the resale price maintenance practices, such as clothing, toiletries, candy, and luggage, the price is the main determinant whether a consumer will or will not buy the product.

Consumer demand is simply not influenced by the level of service for these items, because little or no pre- or post-sale service is required. It is also unreasonable to suggest that the free rider syndrome exists for low cost goods.

Consumers who show even the slightest bit of common sense will not go to one retail store to pump the salesperson about everything he or she knows about a \$6 item, and then jump in their cars and speed down the highway to buy the item from a discounter for 50 cents less.

Additionally, many product information services, such as package inserts and national advertising, are provided more efficiently by the manufacturer than by the retailers.

Dealer services may benefit an individual consumer for sophisticated consumer purchases such as electronic equipment. However, more efficient methods than price fixing can be used by the manufacturer to assure a certain level of services for his or her product.

A manufacturer can insist by contract that a retailer provide services or warranty protection, thereby ensuring services that the dealer provides are the services the manufacturer wants.

Imposing resale price maintenance provides no such assurance, since the dealer is left to his or her own preferences, and may choose to provide services or keep the extra profit. As an incentive to provide these services, a manufacturer can in most instances lawfully provide retailers with exclusive accounts or territories.

For such sophisticated products, we believe that the spirit of competition compels discounters to employ salespeople knowledgeable about the product to provide necessary technical information. There are always other discounters in the marketplace competing for the same consumer dollar.

If reputation about low price brings consumers into a particular store, satisfaction about the service they receive will keep them from going to another comparably priced discounter. The flimsy premise upon which the free rider theory rests suggests that resale price maintenance practices are not imposed to protect point of sale services, but rather are employed to avoid competition. The free rider theory was rejected by Congress in 1975, and its current revival should be given the same treatment today.

Missing from much of the debate about the free rider theory is an appreciation about differences among individual consumers. Just as some consumers will buy designer jeans rather than plain blue jeans, many consumers will continue to shop at select fashionable stores that have ornate displays, heavy promotions, and lavish attention on the consumers. Other consumers may not want to pay or cannot afford to pay for heavy point-of-sale advertising or expensive showroom sales practices.

Consumers demand and deserve the choice of buying the product with all the frills or buying the unadorned product at a lower

price. Competition should include the freedom for consumers to choose from as large a menu of products and merchandising styles as possible.

In the past year, the matter of resale price maintenance has gone beyond legitimate academic debate. The administration's failure to exercise its responsibility to enforce the prohibition on vertical price fixing and their efforts to change the antitrust provisions through the courts reveals a contempt for the intent of the law and for the legislative process.

The National Consumers League endorses the language in the Justice Department authorization, H.R. 2912 by the House Judiciary Committee which prohibits any expenditure of funds by the Justice Department to "overturn or alter the per se prohibition of resale price maintenance," and trusts that this subcommittee will also support this provision.

We have also endorsed the resolution, Senate Joint Resolution 105 introduced by Senator Rudman which calls upon the Department of Justice and other appropriate Federal agencies to vigorously enforce the prohibition against vertical price restraints.

We believe that every opportunity must be taken by this body to rein in Federal officials who are thwarting the clear intent of the law, and to firmly demonstrate that the establishment of antitrust policy lies within the realm of Congress.

In closing, Mr. Chairman, I believe that if the administration's gambit is successful, the ultimate losers will be the small business concerns that have sprung up and flourished to meet the demand for products at affordable prices, and consumers who have enjoyed the lower prices that competition brings.

I thank you for giving me this opportunity to testify before your subcommittee.

[Ms. Warden's prepared statement follows:]

PREPARED STATEMENT OF BARBARA F. WARDEN, EXECUTIVE DIRECTOR, NATIONAL
CONSUMERS LEAGUE

Chairman Luken and members of this important subcommittee, my name is Barbara Warden. I am executive director of the National Consumers League. I want to thank you for extending an invitation to the League to testify before the subcommittee on the subject of resale price maintenance.

As you know, for more than 80 years, the League has been a leader in advocating change in the social and economic conditions of our country to benefit the consumer and worker. Since its founding in 1899, the League has consistently fought for worker and consumer rights and for the effective enforcement of laws that protect and ensure those rights. The League has been instrumental in achieving child labor restrictions, shorter work weeks, minimum wage protections, food and drug safety laws, and employee compensation and occupational safety legislation.

Officers: Robert R. Nathan, Honorary Chairman • Esther Peterson, Honorary President • Rebecca A. Cohen, President •
Bert Seidman, Vice President • Esther K. Shapiro, Vice President • Jack Blum, Treasurer • Ruth E. Kobell, Secretary

The Prohibition of Resale Price Maintenance Practices has Benefited Consumers and Small Business

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It certainly is an odd twist of fate that this Administration, which prides itself on being the strongest advocate of our free market competitive system, will leave a record of disabling a longstanding public policy that has succeeded in spurring competition in the retail industry. Yet, this Administration's efforts to breathe new life into resale price maintenance will leave them with precisely that distinction.

For years, the Supreme Court, the Congress, and prior Administrations have been unanimous on the issue of resale price maintenance, condemning it as one of the most serious, pernicious, and costly of all antitrust violations. The practice restrained trade, inhibited competition, and artificially inflated prices for consumers.

Since 1911, the Supreme Court in a wide variety of cases has held resale price maintenance to be a per se violation of our antitrust statutes. With price competition being at the foundation of our economy, the Court has steadfastly concluded that a private agreement which interferes with setting of prices by free market forces was illegal on its face, and has found no need to inquire into the reasonableness of the rates fixed or the motivation behind the price fixing. Even though the Court has wavered in its rulings on non-price vertical restraints, such as those involving territory, the Court, for over 70 years, has been consistent in finding that vertical price fixing per se is illegal. On this matter, the law is clear, without any room for doubt.

The Miller-Tydings Act of 1937 provided an exemption to the states from federal antitrust laws, enabling them to establish "fair trade laws" and thereby allow manufacturers to engage in vertical price fixing. Recognizing that the Miller-Tydings Act increased consumer prices, aggravated inflation, and retarded the growth of efficient forms of retailing and distribution, the Congress, with the support of the Ford Administration, passed the Consumer Goods Pricing Act of 1975 which repealed Miller-Tydings.

The repeal of Miller-Tydings delivered just as had been promised, giving rise to astounding expansion in the "off-price" retail industry. Comprised of general merchandise discounters, variety stores, catalogue

showroom stores, drug stores, specialty discounters and factory outlets, the off-price retail market has become a thriving industry, with sales easily exceeding \$100 billion annually and forecasts of continued and sustained growth.

With discounting becoming a common practice for records, books, clothing, food, groceries, stereoes, radios, luggage, toiletries, and other consumer items, the prices for these goods dropped dramatically, and consumers have responded with overwhelming approval. Consumers were speaking out loudly and clearly on the issue of resale price maintenance, and they were doing so with a voice that reverberates most strongly -- their pocketbooks.

The public wants quality and value in the products they buy. They look for ways to stretch the purchasing power of a shrinking dollar, they count pennies, comparison shop, save coupons, shop for bargains, and look for sales. They have become increasingly smart shoppers, demanding choice and accountability in products for the best price available. Off-price retailing met a huge consumer demand and provided savings on a great variety of everyday items. It has been estimated that consumers have realized over \$2 billion in savings since the repeal of the Miller-Tydings Act.

For many, during this current recessionary period, discount stores are not just an option, but a salvation, offering a way to buy goods that many consumers could not afford at "suggested retail prices." Is it any wonder that the areas of the country in which discount stores are doing their best are those areas which have been hit hardest by the recession?

Representatives of the businesses who are here today will attest that their businesses have been expanding since 1975, increasing the number of outlets, hiring more employees, and contributing to the tax base of their communities. Their success is repeated in every Congressional District in the country where energetic men and women saw a need and seized the opportunity to provide the public with products they want at prices they want to pay. They showed the initiative and marshalled the resources to establish discount stores, then channeled their efforts to reduce overhead, conserve energy, minimize transportation costs, maximize space utilization, improve the efficiency of the service, and provide other cost-saving measures designed to bring consumers quality products at affordable prices. Many discounters cut prices to the bone in order to achieve high volume sales at very low mark-up.

Actions of the Administration

I need not go into an elaborate discussion of the importance of the small business sector of the economy with this subcommittee. Suffice to say that small businesses provide the largest bulk of jobs for our citizens and that a healthy and vigorous small business sector is essential in maintaining our national strength and vitality. Businesspersons operating discount stores should be rewarded for their efforts. Yet, the Administration's policies penalize the enterprising discounter while protecting the retailer who fears competition and is less efficient in his or her operation.

The Administration's principal antitrust enforcement officials, Assistant Attorney General William Baxter and Federal Trade Commission Chairman James Miller have ignored the per se illegality of vertical price fixing because it does not reflect their personal economic philosophy. Not only have they not brought any new vertical price fixing cases against companies charged with price but they also have undertaken a campaign to change the antitrust laws by joining companies accused of unlawful restraint of trade in petitioning the Supreme Court to remove the per se prohibition against vertical price fixing.

Their actions have fostered a climate in which illegal price fixing is spreading. In effect, they have given price fixers tacit approval for their price fixing activities. It matters little that resale price maintenance is illegal when the agencies charged with enforcement will not actively enforce the law and are determined to restore resale price maintenance. The clear signal they have issued to manufacturers has certainly contributed to the resurgence of illegal resale price maintenance practices. Many small businesspersons are becoming the victims of resale price maintenance or are subject to coercive conduct by their suppliers.

The pet economic theory espoused by the Administration's chief antitrust enforcers maintains the existence of the "free rider" which is lurking behind the scenes of every successful discount operation. As the theory goes, all dealers should be forced to charge the same price for the same item, or discounters will be able to lower prices because they will do away with services like fancy showrooms, informative salespeople, and extensive point-of-sale advertising. Consumers will then go to the full-service retailer, take advantage of all these services to find out about a product, and then buy the product from the discounter who was catching a free ride on the services provided by his or her competitor.

It is a specious proposition to suggest that discounters are successful because they get a "free ride." For most items that would be subject to resale price maintenance practices, such as clothing, toiletries, candy and luggage, price is the main determinant in whether a consumer will or will not buy the product. Consumer demand is simply not influenced by the level of service for these items, because little or no pre- or post-sale service is required. It is also unreasonable to suggest that the free rider syndrome exists for low-cost goods. Consumers who show even the slightest bit of common sense will not go to one retail store to pump the salesperson about everything he knows about a \$6.00 item, then jump in their cars and speed down the highway to buy the item from a discounter for 50 cents less. Additionally, many product information services, such as package inserts and national advertising, are provided more efficiently by the manufacturer than by the retailers.

Dealer services may benefit an individual consumer for sophisticated consumer purchases such as electronic equipment. However, more efficient methods than price fixing can be used by the manufacturer to assure a certain level of services for his or her product. A manufacturer can insist by contract that a retailer provide service or warranty protection, thereby ensuring that services the dealer provides are the services the manufacturer

wants. Imposing retail price maintenance provides no such assurance since the dealer is left to his or her own preferences and may choose to provide services or keep the extra profit. As an incentive to provide these services, a manufacturer can, in most instances, lawfully provide retailers with exclusive accounts or territories.

For such sophisticated products, we believe that the spirit of competition compels discounters to employ salespeople knowledgeable about the product to provide necessary technical information. There are always other discounters in the marketplace competing for the same consumer dollar. If reputation about low price brings consumers into a particular store, satisfaction about the service they receive will keep them from going to another comparably priced discounter.

The flimsy premise upon which the "free rider" theory rests suggests that resale price maintenance practices are not imposed to protect point-of-sale services, but rather are employed to avoid competition. The "free rider" theory was rejected by Congress in 1975 and its current revival should be given the same treatment today.

Missing from much of the debate about the "free rider" theory is an appreciation about differences among individual consumers. Just as some consumers will buy designer jeans rather than plain blue jeans, many consumers will continue to shop at select fashionable

stores that have ornate displays, heavy promotions, and lavish attention on the customers. Other consumers may not want to pay or cannot afford to pay for heavy point-of-sale advertising or expensive showroom sales practices. Consumers demand and deserve the choice of buying the product with all the frills or buying the unadorned product at a lower price. Competition should include the freedom for consumers to choose from as large a menu of products and merchandising styles as possible.

In the past year, the matter of resale price maintenance has gone beyond legitimate academic debate. The Administration's failure to exercise its responsibility to enforce the prohibition on vertical price fixing and their efforts to change the antitrust provisions through the courts reveals a contempt for the intent of the law and for the legislative process. Will the laws of our country be upheld as enacted by the Congress or be undermined to meet the economic theories of Administration officials? Clearly their actions have infringed on the Constitutional prerogatives of the Congress. If the Administration deems changes are necessary, then they should forward proposed legislation to the Congress.

The National Consumers League endorses the language in the Justice Department Authorization, H.R. 2912, by the House Judiciary Committee which prohibits any expenditure of funds by the Justice Department to "overturn or alter the per se prohibition of resale

price maintenance," and trust that this subcommittee will also support this provision. We have also endorsed the resolution, S.J.Res. 105, introduced by Senator Rudman, which calls upon the Department of Justice and other appropriate Federal agencies to vigorously enforce the prohibition against vertical price restraints.

We believe that every opportunity must be taken by this body to rein in federal officials who are thwarting the clear intent of the law and to firmly demonstrate that the establishment of antitrust policy lies within the realm of Congress.

In closing, Mr. Chairman, I believe that if the Administration's gambit is successful, the ultimate losers will be the small business concerns that have sprung up and flourished to meet the demand for products at affordable prices and consumers who have enjoyed the lower prices that competition brings.

I thank you for giving me this opportunity to testify.

Mr. LUKEN. With reference to your last comment about H.R. 2912, presumably that authorization has a good chance of passing in its present form. Now this language is designed to prohibit any expenditure which will overturn or alter the per se prohibition of resale price maintenance.

Do you think that this will be effective if it is passed by the Congress?

Ms. WARDEN. Well, I think that it is difficult to measure whether it will be effective. I am not a predictor to be able to say yes, it will be effective. But I think that it is a way of preventing the Justice Department from utilizing its budget in another way to impose resale price maintenance or to restore resale price maintenance. Anything that the Congress can do to prohibit the restoration of resale price maintenance that is within the jurisdiction of Congress—

Mr. LUKEN. Do you have the same problem with the FTC?

Ms. WARDEN. Pardon me.

Mr. LUKEN. Do you have the same problem with FTC? This only directs the expenditure of funds to the Justice Department. This is the Justice Department authorization.

Ms. WARDEN. Yes.

Mr. LUKEN. Do you think that similar language should be appended to the FTC authorization?

Ms. WARDEN. Well, I think that it could be helpful. If the funds for the FTC were used to carry out the intent of the law rather than to thwart the law.

Mr. LUKEN. Do you find the same problems with the FTC administration as Justice, or similar problems, or do you find any problems?

Ms. WARDEN. Well, I tell you, I have a little bit of difficulty knowing just exactly what the administration's position is on resale price maintenance. Probably because in the Congressional Record in 1975 when Ronald Reagan was Governor, he came out with an interesting statement.

The statement was:

We live in a time when the barnacles of Government regulations have added measurably to the cost of goods we buy. Let us rethink the fair trade laws altogether, eliminate them, and some prices should be going down as a result. It may not lick inflation, but it would help.

Now that was 1975, and it seems to me that question could more appropriately be addressed to the Chairman of the FTC as well as to other administration officials about just exactly what their position is.

Mr. LUKEN. That raises a question in my mind. You say it is difficult to know what their position is?

Ms. WARDEN. Well—

Mr. LUKEN. Do we not know people by their deeds, what do you know about what they are doing?

Ms. WARDEN. Well, I do not happen to—

Mr. LUKEN. I was hoping that you would be able to shed some light on just what the agency is doing in its cases.

Ms. WARDEN. I do not think the agency is attempting to uphold the law. I think that the way that they have gone in to file friends of the court briefs on the side of business, and the kind of message

that they are giving tacitly to the business community, that encourages the business community to begin restoring the resale price maintenance practices——

Mr. LUKEN. Do you mean the FTC or Justice?

Ms. WARDEN. The FTC.

Mr. LUKEN. The FTC files briefs?

Ms. WARDEN. Yes, I believe so. I may be incorrect about that.

Mr. LUKEN. In any event, what I would be interested in would be the specific cases that FTC has brought or particularly has not brought where complaints have been filed with the FTC. Could you help us?

Ms. WARDEN. Well, what I would like to do——

Mr. LUKEN. And, also, another related question.

Ms. WARDEN. Yes.

Mr. LUKEN. You mentioned small business. Of course, this is the Small Business Committee. I do notice that we have some apparently serious complaints by witnesses here today, but they are not necessarily the smallest of businesses who are complaining.

If you can give us any help as to small business filing complaints in this area, or being injured in this area, any specifics.

Ms. WARDEN. I will give you one specific. I think that there is a chain of clothing stores around the country—not in all the States, but I think in seven or eight States—called the Burlington Coat Factory. The Burlington Coat Factory advertises, and I have seen their ads.

Mr. LUKEN. Is that a small business as you would define it?

Ms. WARDEN. Well, it is a chain of stores. Obviously, it is not——

Mr. LUKEN. Not the smallest?

Ms. WARDEN. It is not the smallest. However, it does deal with a vital consumer product, which is clothing. It is not just clothing for women; it is clothing for all family members. Now I think that even though it is not a small business, if you take a look simply at family budgets for clothing for children and other family members, it is something that I believe—and I think that the league does, too—that you have to pay close attention to.

Or I would venture to say that the constituents in your district when they are taking a look at how they are going to spend their money, their family budgets on their purchases, clothing is a big factor. Admittedly, the Burlington Coat Factory is a fairly sizable chain. Nevertheless, they are dealing in a basic need for families and individuals.

Mr. LUKEN. I certainly agree, and we all applaud the existence of the Burlington Coat Factory and discount businesses like that. I was trying to get to what information we could get if there is any. We acknowledge that it is more difficult for the smallest kinds of businesses; it is very difficult for them to come forward, because they are employed in a lot of survival activities, so that they do not get involved in the legislative matters.

Ms. WARDEN. Well, one of the things that the league is going to do is to survey our own members about the use of discount stores, and the extensive use of discount stores, and asking them to find out for us. I am not sure just how much information exists in answer to your question—but the issue of the availability of discount stores, the continued availability of discount stores and basic

items for consumers is important to the league, and this is information that we are going to try and elicit from our own members, so I do not have information for you right now.

Mr. LUKEN. Does counsel on either side have any particular questions here?

[Pause.]

Mr. LUKEN. All right, Mr. Sabbath.

Mr. SABBATH. Do you believe that the changes that were discussed with Mr. Muris regarding the per se rule or the rule of reason would have any significant impact in the ability of people to bring cases alleging, and their success in bringing these cases alleging vertical price fixing?

Ms. WARDEN. My understanding of the rule of reason is it is a much more protracted process of bringing complaints. It is more time consuming; it is more expensive. It is on a case-by-case basis rather than establishing a flat out illegality of certain kinds of practices.

I think that that in itself would or could tend to impose a chill factor, because it is expensive and it is time consuming. You are never really sure just what the outcome of the case is going to be. I think that it could impose a kind of chill factor on people even lodging the complaint to begin with.

Mr. SABBATH. Have you done any surveys with regard to the free rider issue that you described in your testimony? Do you know if consumers go to a very pretty showroom where there are a lot of services, and then gain information, and then travel to another location and make their purchase—a catalog place or discount store—where there might not be as much service?

Ms. WARDEN. I have not done any formal surveys. The league has not done any formal surveys. However, I think that there are times when one can use one's own personal experience as a rough guide how other individuals behave. But I do not think that any of us has a hell of a lot of time for basic items to do a lot of comparison shopping that would require miles and miles of travel. Maybe for very expensive items, such as electronic equipment, stereo equipment.

I think that people tend to shop in their communities. They do look for bargains. But I think that it does not strike me as being realistic to think of a family that is out shopping that is not terribly familiar with—already knowing in their community where they get the best purchases, that they would spend a great deal of time traveling to fancy showrooms, and then as I said speeding down the highway, and going someplace else.

It does not strike me as a realistic view of how people would be willing to spend their time. Unless it were desirable, because it was a major expenditure in their budgets, such as a car, such as a piece of electronic equipment. Then I would say that there should be that kind of comparison shopping.

Mr. SABBATH. Thank you, Mr. Chairman.

Mr. LUKEN. You know, I do not know how to formulate this question well. But this question arises in my mind. If Macy's, or Bloomingdale's—

Ms. WARDEN. Gimbel's.

Mr. LUKEN. Or Gimbel's, or whatever, full-service department store, spends tens of thousands of dollars in a community like Cincinnati, or Cleveland, or someplace in advertising a certain product and in advertising itself also, and then the discounter comes in and runs a little ad, which just may be perceived, and we all know that, that here we are going to sell you this product which has been advertised by Macy's, or Gimbel's, or so on, leans heavily on all of the advertising; then what are we going to say to the Macy's or Gimbel's.

I understand according to the law, and I would be in favor of enforcing that law, that there should be any overt agreements of conspiracies for resale price maintenance. But what we get into is what amounts to agreements, and interpreting what amounts to agreements or violations. I think that all of those circumstances generally are taken into the calculation of determining whether a violation has occurred.

Do you have any comment on that? Having said that, are you in agreement or not with the proposition that a clothing manufacturer can publicly state that that manufacturer will only sell to a certain type of retailer?

Ms. WARDEN. Am I in agreement—

Mr. LUKEN. Maybe that is too general. I think that was a question that we addressed.

Ms. WARDEN. Yes, I thought that was the one that you had asked him. I am not in favor of that statement, because I think that it sets up the possibility for exclusions of lots of legitimate competitors.

Mr. LUKEN. Let me get a little more specific.

Ms. WARDEN. All right.

Mr. LUKEN. I think what I asked him is is it true that a businessman has the right to refuse to deal with whomever that businessman chooses or businessperson, and may announce in advance that businessperson will refuse to sell to discounters.

You do not favor that, of course.

Ms. WARDEN. No.

Mr. LUKEN. Do you think that it is illegal?

Ms. WARDEN. It certainly sounds coercive, quietly coercive. And I think it could very easily smack of illegality, because I think that it is an attempt to limit the amount of competition and the degree of competition within a field by the manufacturer in making that determination.

I think that the consumer on the receiving end of it, that the consumer is the one who is going to lose, if there is this tacit or overt agreement or pressure that the manufacturer will only sell to let us say two or three distributors who will abide by certain prearranged agreements. If another legitimate competitor says, well, I would like to be able to sell those goods, but I will not agree to the terms that you dictate, I do not think—

Mr. LUKEN. From the standpoint of the manufacturer in the case that I cited, the discounter could not exist—

Ms. WARDEN. Without the manufacturer.

Mr. LUKEN. Without that full-service retailer in that case that I cited, because the discounter is only selling on the basis of I can tell you what Macy's is selling, but I can sell it cheaper. In that

case, if the discounter is saying I can sell you Arrow or Van Heusen, or some other brand, that is one thing and would stand on some merits. But in the case that I cited which I think occurs, I believe it does, where that off-price discounter is only existing because of its reliance on advertising that it can sell you what Macy's is selling, but selling it cheaper. But if Macy's did not exist, then that discounter would not exist, at least not as far as that trade is concerned.

Ms. WARDEN. Therefore, your question is—I have kind of lost you.

Mr. LUKEN. My question is you are talking about fairness, and we are all talking about fairness, what the attitude of the manufacturer would be in such a situation? The manufacturer just might feel that I have to make a statement like that, namely that I reserve the right to refuse to deal with whoever I may want to and not to sell to discounters. Because the manufacturer may feel if the manufacturer does not take that position, he is not going to have a market out there.

Ms. WARDEN. As a matter of fact, I would take the other tack. I think that the manufacturer would be foolish, because to sell only to Macy's who sells particular goods at established retail prices eliminates an enormous market of people who cannot afford the established retail price, who can only go to the discounter.

I think that it would be foolish on the part of the manufacturer to say, "I will only sell to Macy's." If they are looking at their own profit margin, that I will only sell to Macy's, and eliminate the discounter because I think they then run a great risk of eliminating a large market of potential buyers who need that discount house and cannot afford to go to Macy's.

Mr. LUKEN. I am inclined to agree with your observations, but I am not Macy's, obviously.

Ms. WARDEN. Neither am I. I wish I were.

Mr. LUKEN. I mean just in the context of what you just stated, but I was trying to confine my observations to a narrower kind of case situation.

Well, we thank you, very much.

Ms. WARDEN. Thank you, very much.

Mr. LUKEN. Does anyone else have anything else to add?

[No response.]

Mr. LUKEN. We thank you for your testimony. If you have any specifics that you want to send along about small businesses as you described that you are still looking into, the record will be held open.

Ms. WARDEN. Good. Thank you, very much. I appreciate it.

Mr. LUKEN. Next a panel is scheduled. I do not know whether everybody is here or not. I believe that Mr. Morrison Cain is here.

Mr. CAIN. Yes.

Mr. LUKEN. And Larry Hochberg or Bob Cole.

Mr. HOCHBERG. Yes.

Mr. COLE. Bob Cole.

Mr. LUKEN. The Burlington Coat Factory is not here as yet.

Mr. CAIN. Mr. Chairman, I am Morrison Cain, and I am public affairs counsel with the Association of General Merchandise Chains. I understand that the president of Burlington Coat Factory

is in transit, delayed in transit on his way down from New Jersey. We do have Barry Lefkowitz, who is director of governmental relations with Burlington Coat Factory.

Mr. LUKEN. All right, let's go ahead then. It sounds like Mr. Lefkowitz is reasonably well qualified to represent himself well on this subject. So we will proceed then with counsel, Mr. Cain, Mr. Cole, Mr. Hochberg, and Mr. Lefkowitz.

Mr. CAIN. We also have Mr. Herbert Kassner, who is counsel to Burlington Coat Factory; he is with the firm of Kassner, Haigney & Thomson in New York.

**TESTIMONY OF MORRISON CAIN, PUBLIC AFFAIRS COUNSEL,
ASSOCIATION OF GENERAL MERCHANDISE CHAINS, INC.**

Mr. CAIN. Mr. Chairman, I would like to begin by thanking the subcommittee for its continuing attention to what we feel is a growing problem with anticompetitive price restrictions being imposed on the retail industry.

The Association of General Merchandise Chains represents the Nation's discount, variety—

Mr. LUKEN. Just a moment, a housekeeping question.

Do we have your prepared statement, Mr. Cain?

Mr. CAIN. I just have a short statement introducing the witnesses. I do not have formal remarks.

Mr. LUKEN. All right, proceed.

Mr. CAIN. AGMC represents retail companies which operate more than 20,000 discount, variety, dollar, junior department, family center, off-price, catalog showroom, and other general merchandise stores. Our members include not only many of the Nation's largest retail chains, but they also include companies active in one or more regions of the country, or a few localities, or even a single store.

Our members are found in every State in the Nation. Altogether they had annual sales last year in excess of \$40 billion. In response to one of your earlier questions, I would point out that the majority of AGMC's members in fact are small business under SBA definitions and proposed definitions. We have many members who operate single stores, or have a small discount or a small variety store.

Mr. LUKEN. The Association of General Merchandise Chains—

Mr. CAIN. Actually, you do not need to be a chain. You have to be a single store, and we have many single stores. Some of our oldest members have been operating single stores for 50 years.

Mr. LUKEN. I would not accuse you of deceptive advertising in your name.

Mr. CAIN. We appreciate that. We sometimes have some differences with the FTC, but I do not think that we would have a problem here.

Two AGMC member companies are here today on behalf of the entire industry, our large and our small members, to give you details of their competition experience, and what they feel has been a lack of response by the Nation's antitrust officials.

Indeed, we think that the antitrust division of the Department of Justice is actually leading the charge to undermine existing law by filing briefs in the courts and making public statements which we

think have caused a great deal of difficulty for price competitive retailers. We think that it also causes substantial confusion in the marketplace. Our witnesses can speak from practical experience in retailing. Mr. Hochberg is an outstanding example of how price competition can help a small business grow. He began in 1958 with \$2,000, and opened his first Children's Bargain Town, which is a discount toy operation.

After that company was acquired by a larger company, Mr. Hochberg left. Parenthetically, that chain eventually was developed into what is now the Toys "R" Us chain, but it is a small business success story.

Mr. Hochberg then left in 1971 and opened Sportmart. Sportmart offers outstanding values and service on a wide range of sporting goods, sportswear, and footwear-related items. It is still a relatively small chain, but it has grown to be one of the No. 1 sporting goods retailers in the Chicago area.

Burlington Coat Factory began with a single off-price store in 1972. That company is known as a leading innovator in the rapidly growing off-price apparel retail industry.

Recently there has been an upsurge in attempts by suppliers, and perhaps some higher-priced retailers, to either fix prices or to deny merchandise to price competitors. Our retail members large and small alike feel that their continued existence is threatened by attempts to fix the prices at which they can sell the merchandise which they have bought.

They think that it is also threatened by attempts to change or undermine the law which has been in place for over 70 years which makes price-fixing from the top down an automatic violation of Federal antitrust laws.

We think that the upsurge in attempts is encouraged by signals from Federal antitrust officials that they do not agree with the law, that they do not intend to enforce it, and that, if they have their way, they will change it.

We note that 1975, Congress very wisely repealed fair trade laws which allowed anticompetitive and anticonsumer resale price maintenance, and a number of States had already, on their own, repealed those laws.

We think that Congress and those States acted after weighing the economic evidence and the arguments, the same arguments that we will hear again today, and concluded that resale price-fixing should not be permitted. The heads of the antitrust division and the Federal Trade Commission do not agree with the congressional intent, they do not agree with the unbroken line of Supreme Court cases which hold resale price maintenance per se illegal.

We believe that the law should be enforced, and it should not be undermined. Parenthetically I would note that the Nation's largest organization serving small business, the National Federation of Independent Business, testified last year at hearings that the subcommittee had in opposition to a change in the law in this area based on a poll of their small business members.

We also believe that if the law is to be changed—and we do not feel that it should be—that change should come from Congress and not the personal economic views of the Federal antitrust officials.

We thank the subcommittee and the other arms of Congress for paying growing attention to this area, to this threat to competition. I would like to close, before the AGMC witnesses tell their story, to ask the subcommittee to convey its concern to Federal antitrust officials through its continued oversight; and if necessary, by joining in legislation to make clear the intent of Congress that retail price fixing must remain illegal.

Thank you, very much, Mr. Chairman.

Mr. LUKEN. Thank you, Mr. Cain.

I might add, as you were talking about the interest of Members of Congress, that I think we would have had a better attendance of Members this morning, but there are frequently competing demands. There is a briefing right now on the Korean airliner incident for all Members. I suspect that some of our other Members who might otherwise be here are attending that briefing.

Mr. CAIN. We understand that, Mr. Chairman. As a matter of fact our president, Edward Borda, has not been able to leave simultaneous hearings in the Senate on another issue. I understand this is a very busy time in the schedule.

Mr. LUKEN. I know that there are members who are extremely interested in this issue who are not here.

Who is next?

Mr. HOCHBERG. I guess I go first.

Mr. CAIN. Yes, I would like to introduce Larry Hochberg from Sportmart.

Mr. LUKEN. Mr. Hochberg.

TESTIMONY OF LARRY J. HOCHBERG, PRESIDENT, SPORTMART, INC., ON BEHALF OF THE ASSOCIATION OF GENERAL MERCHANDISE CHAINS, INC.

Mr. HOCHBERG. Good morning. I am Larry Hochberg, president of Sportmart, Inc. We operate in the Midwest, the Chicago area, and California. As Mr. Cain said, I am an entrepreneur by nature. Having developed the Toys "R" Us concept in toys, I was not a professional manager, so when the company was sold, I eventually felt that I should do something else, and developed the new concept called Sportmart in sporting goods, which by the way not only gives the people a good value, but does provide all kinds of service.

We do not think that service and guaranteed markup go together. We think that efficiency, and good value, and service go together to make a profitable operation. So you could call us a discounter because we make our own prices on what we sell, but we feel that the service that we provide is as good as any department store in the United States.

The main thing that I would like to start by saying, Mr. Congressman, is that I am so thankful that we have separation of powers in the United States of America. The way in which this group and other groups in the Congress are looking at this issue and calling the Justice Department and the FTC to task, and the attempt to switch American law, I am so gratified about it, that it is a pleasure to pay taxes, I can tell you.

Of course, as all of us know, it generally has been bipartisan historically that price fixing is a no-no. I just cannot see any reason

why anyone would want to change that. It works; why should we monkey with it.

We started very small. We are medium sized now. But we did an analysis on our 1981 sales, which were around \$29 million that year, comparing our prices with what our prices would have to be if we followed the manufacturer's suggested list.

Our estimate is that our customers in Chicago would have paid approximately \$8 million more to buy the same name brand goods had we been forced to go along with any diabolical plan to decide with manufacturers what the American people should pay for their merchandise.

We think that is very significant, because that \$8 million that was saved obviously went to buy other things, and created more jobs, more production, and anti-inflation.

We think that price competition is a critical element of the free enterprise system. Both parties for their own reasons have always felt that American business should compete on price as well as everything else.

Our company received an Actionwear of the Year Award. Our clothing department is considered in our activewear area to be the best in the United States. That does not mean that we need an artificial markup to make it that way.

The consumers are very smart. They know value. Value is not just a low price. Value is a good price on something that they want, and they are very smart. They can decide where to go to get that, and they will not buy it if they do not think that it is a good value.

Mr. LUKEN. Do you want us to compare consumers and voters in this respect?

Mr. HOCHBERG. Generally, the voters do not do a bad job either.

Mr. LUKEN. I am inclined to agree with you at times.

Mr. HOCHBERG. In general, they have wisdom. We have had battles through my 25 years of business at different times when the ebb and flow comes on price fixing. We have been willing to go to Federal courts. We have been willing to stand up to almost any situation where we were coerced to raise our prices, because we think that what we sell our merchandise for is our business, and that no manufacturer or other competitor knows better what we ought to sell our merchandise for than we do. Generally, the public has been receptive. We are still in business, and we function pretty well.

Now Sportmart from a very practical standpoint, from someone who has been engaged in price competitive retailing for many years, I can tell you that there would be no significant difference in the real business world between allowing vertical price fixing and setting up fair trade laws again. There is just no difference.

If we want to change the law and bring back what was the fair trade situation again, allowing the Justice Department to have any kind of rule of reason or whatever for price fixing, would exactly do that.

If suppliers are free to prevent price competition among retailers who have bought from them, prices will shoot up and price competitors will be hurt very, very badly, and they will not be able to compete on price.

Prior to 1975, when fair trade laws were in effect in various States, and most of them were repealing them by that time anyway, if you went to buy a pair of Levi blue jeans, where there is not a large element of service involved, it is not a technically complicated item which we have in front of us here, you would go into 50 stores, and this is recently, 7 or 8 years ago, you would find the same price on that pair of blue jeans anywhere you would go.

So where was the customer's choice? When fair trade went out, and the FTC did its job of pursuing very seriously vertical, horizontal conspiracies that involve both types—and we think that generally it is very difficult to separate a vertical from a horizontal. Price fixing arrangements or conspiracies do happen, but they are hard to prove. When the Government gives its weight to saying, well, price fixing may be OK, then you really get a running climate like what you have today, and which is just beginning to spiral.

Today if you want to buy Levi blue jeans, you can go to Target stores, or if you go to Dayton or any of jeans places, you will find a different price everywhere you go on blue jeans. The customer benefited.

Mr. LUKEN. If I may interrupt. Perhaps it would be a more logical way to approach this if we asked you to deal with this question as you are testifying, since you are touching upon it anyway. It is the question which we asked the other witnesses.

Mr. HOCHBERG. Sure.

Mr. LUKEN. I will read it to make sure that it is the same question.

Is it true that a businessperson has the right to refuse to deal with whomever that businessperson chooses, and may announce in advance that he or she will refuse to sell to discounters?

Mr. HOCHBERG. OK. My opinion is that if a manufacturer says that we want to market our product in a certain way, we want a certain amount of service, we want this, we want that, we want to make sure that it is stocked in a clean location, we want to make sure that you have enough selection of our product to have it interesting to the consumer, I think that those things are great, and those are reasonable.

As soon as a manufacturer knows and thinks that he can get into the area of price fixing, that he will not deal with anybody who will not resell at a fixed price, that is what I think the FTC should be looking into, that kind of an arrangement. Not as Mr. Muris said with a small staff to try to set different standards in different cases, where no one will know where you will even have a chance to prevail in the FTC.

Mr. LUKEN. You used the word arrangement, and maybe you did it intentionally. But I am asking. The question relates to just an announcement.

Mr. HOCHBERG. I am not a constitutional lawyer. If I heard an announcement—

Mr. LUKEN. You tend to have to be here.

Mr. HOCHBERG. OK. If I heard that announcement based upon my experience in business for 25 years, that would put my antenna up that these fellows are planning a price rigging program. Until this year, you did not hear of that kind of thing in American business.

Now with the Justice Department and the FTC saying maybe certain kind of price fixing should be OK, and another kind of price fixing is not OK, now you have very large corporate institutions that are coming out and saying we only want to deal—

Mr. LUKEN. Well, that is not my understanding of the situation.

Mr. HOCHBERG. OK.

Mr. LUKEN. My understanding is the complaint about the Justice Department and/or the FTC is that the Justice Department under its rule of reason would wink at or not enforce the per se rule, meaning that it would not move even in cases where there would be price setting by agreement, if it felt that it was not anticompetitive.

Mr. HOCHBERG. I think that that is accurate.

Mr. LUKEN. Now that is what I think that the Justice Department has said and will say here today. But that is one thing that goes further than the example that I gave to you. That would be where there is actually an agreement. But in this case, we are only talking about the case, or at least the example cited only goes to the extent that the retailer would make the announcement—

Mr. HOCHBERG. The retailer?

Mr. LUKEN. I mean the manufacturer. I beg your pardon, I stated that wrong. The manufacturer would only sell to nondiscounters. Now that is an unilateral statement. I want your reaction, because we all understand that the interpretation of what constitutes an agreement may not be a specific overt agreement face to face, or spoken, or written, or whatever. It may not.

What constitutes an agreement is a part of the question that I am asking.

Mr. HOCHBERG. Yes. I think again when you say not sell to discounters, again I have a different philosophy. That the price that the retailer puts on the product does not necessarily indicate the quality of the dealer. So if you are saying, does the manufacturer have a unilateral right to say that we will not sell to anybody that sells at less than suggested list. I think that is what you are asking. That they can unilaterally say we will sell to nobody who will not hold the price at this price, if that is your question, it may be legal under the present law, but no one was willing to say it and do until we had the current climate going on that we do.

My personal feeling is that it is very bad. Maybe it is something that Congress wants to address, if they want to make it clear that price fixing is illegal. It seems to me that if you want to have a law saying that you can suggest retail price, but you cannot discontinue or only decide to sell a particular store if they will hold the price. I think that is bad direction. I think that is something that the Congress could be very constructive in.

Mr. LUKEN. I will ask you just one more question.

Mr. HOCHBERG. I hope that I am being responsive.

Mr. LUKEN. Well, they are very difficult questions, and we certainly do not expect everyone to have a detailed comment on every one of them. Would you want to respond to a further question which is another aspect of the same thing, the discounter or the off-price merchandiser does sometimes say in its advertising that you can get the same product here that Macy's, or Gimbel's, or Bloomingdale's has been selling for more.

That happens, does it not?

Mr. HOCHBERG. I guess it happens.

Mr. LUKEN. Have you ever seen it happen?

Mr. HOCHBERG. Oh, I think—

Mr. LUKEN. I mean it does make a difference if it does not happen very often.

Mr. HOCHBERG. I think that generally more decent stores that are not just off-price and end lot type stores sell what they have at the price they have it. They do not necessarily go against anybody else. They have an item at a price. This is what we are selling for.

Mr. LUKEN. You do not think that it happens?

Mr. HOCHBERG. I would not call it a major problem, no. If you are trying to create an argument for price fixing, maybe you could say that is a major problem. But I do not think that it is a major problem in my opinion. That is my opinion.

We view price fixing as the problem, not the solution. Again, this issue has become so serious that when you talk about Senate Joint Resolution 105, both Republican Senators from Minnesota are in support of this effort to cut back the Justice Department from spending public money to intervene on behalf of defendants in price fixing cases. It is a very bipartisan commonsense thing, in my opinion.

I believe it is no help to say to an injured retailer that you can still go to court and try to prove a specific harm, not only to you, but to the whole industry involved. If you want redress, you do not need a per se rule on price fixing.

I think that the Federal antitrust agencies exist to prevent illegal trade practices, especially price fixing which harm competitors. I believe that they should carry out their sworn duty, and not leave the enforcement to private parties.

If these laws continue to get eroded, I do not think that a private person or a private company would dare even go into court to try to prove a conspiracy. The cost is enormous as it is in hundreds of thousands of dollars, and you have no chance of prevailing. There are no presumptions in your favor about price fixing.

So what do you have to go on is, How are you going to prove a conspiracy to fix prices, where are you going to get it in writing, how are you going to do it?

I also feel that Congress and the courts are on top of this, and I do not think that they will let it happen. I do not think that it makes political or economic sense.

I am trying not to read too much, because I do not want to bore you gentlemen. But if Federal antitrust officials refuse to enforce the law against illegal resale price fixing or to weaken the law, it only stands to reason that there will be a dramatic impact on the prices consumers pay.

The evidence given before was quite good in that respect. Price competition helps slow down the cost of living rise. The rebirth of resale price maintenance will be a new lease on life for inflation.

It is our belief there is little, if any, evidence in the marketplace to justify the refusal of the Department of Justice or the FTC to enforce what we believe to be a clear legislative and judicial mandate.

There is one last point that I would like you to keep in mind. Of all of the segments of the American economy, none works better, or more efficiently, or more competitively than the Nation's system of distribution.

Whatever problems that manufacturing industries may be having, the way that we distribute and sell consumer goods is one of the great success stories in our economy. Vigorous competition in a free marketplace means that American consumers have more choice, and can obtain more goods for less money than anywhere else in the world.

Price competition helps keep all of us on the alert to develop newer, more productive, and successful ways of operating.

As you said before, Congressman Luken, technically GM might be able to tell every dealer in the United States how to sell a Chevrolet car model at the same price. If you want to shop for a car, as you kind of put it, it seems as though they might be able to force every dealer to have the same price, and you could not shop competitively.

If one dealer decided to break ranks, he would have a real uphill battle to prove in an antitrust suit that he was cut off because he cut the prices. I just think that the whole area is one that we ought to forget about, and move on to enforcing the law as these agencies are funded to do, and especially regarding price fixing.

I would be happy to answer any questions.

[Mr. Hochberg's prepared statement with attachments follows:]

PREPARED STATEMENT OF LARRY J. HOCHBERG, PRESIDENT, SPORTMART, INC., ON
BEHALF OF THE ASSOCIATION OF GENERAL MERCHANDISE CHAINS, INC.

I am Larry J. Hochberg, President of Sportmart, Inc. and I appreciate this opportunity to appear before you on behalf of the Association of General Merchandise Chains, Inc. (AGMC), on a crucial question for retailers, consumers and small business. The issue is: should Federal antitrust agencies enforce the long-standing rule of law which forbids manufacturers to fix retail prices, or should they ignore or undermine that law?

The Association of General Merchandise Chains, Inc. (AGMC) represents the nation's discount and variety general merchandise retail industry. AGMC's discount, variety, dollar, junior department, family center, off-price, factory outlet, catalog showroom, and other general merchandise stores. Our members range widely in size and include many of the nation's largest retail chains as well as companies active in one or more regions of the country and those with only a few localities, or even a single store. AGMC member company stores are located in all 50 states and accounted for over \$40 billion in sales.

My company, Sportmart, Inc., is based outside of Chicago in Niles, Illinois. Sportmart operates eleven sporting goods stores, seven in the Chicago area and four stores recently opened in California.

Although I am a graduate of Northwestern Law School, my experience has been in general merchandise and related fields. From 1958 to 1969, I was co-founder and principal of the Children's Bargaintown U.S.A. chain, which developed into the very successful Toys R Us

chain, after it was sold to Interstate Stores. I stayed on as President of Children's Bargaintown until 1970, when another executive there and I left to form Sportmart.

When I started Children's Bargaintown, U.S.A. in 1958, I had less than \$2,000 to my name. But, hard work, and the freedom to compete, enabled us to build that business.

Sportmart did not open its first store until 1971. As recently as 1980, we had five stores, all in the Chicago area. I think that Sportmart's success is a tribute to the way that marketplace competition enables a small company to grow by meeting consumers' needs. While our company is still relatively small, with about \$40 million in sales last year, in under ten years it has become the #1 sports retailer in the Chicago area. That illustrates the strength and opportunity for small businesses in a free marketplace.

Our growth has come because our stores offer what consumers want. They carry 60,000 stock items in sporting and recreation equipment, accessories, sportswear, footwear and other related items. The stores are attractively decorated and include extensive display areas. Our stores are conveniently located with their own free parking facilities.

Our sales staff are sports-trained and consumer-oriented. To keep current on new products, styles and technical developments, they attend manufacturers' seminars and receive our own in-house training.

Sportmart is the only sporting goods chain I know of that keeps current technical product manuals for all sales personnel in every department.

We provide extensive services, at least equal to that available in higher-priced stores, for the merchandise we sell. We drill bowling balls, fit ski bindings, string tennis rackets and provide many other services. We even provide ski or sailing instruction when we sell skis or sailboards.

As a volume merchandiser, we regularly offer competitive low prices. Our company does not promote so-called "sales" on special occasions. Instead the Sportmart philosophy is to offer consumers outstanding value in the form of everyday low prices and quality service. Our prices are fair, competitive and, unlike those at some retailers of seasonal goods like skis, the same throughout the year.

By analyzing Sportmart's 1981 sales, which totaled \$29.6 million, and comparing our actual prices with the manufacturers' suggested prices, I can estimate what our customers would have had to spend if they were forced to pay suggested manufacturer's list price. Fixed resale prices, which Federal antitrust officials say ^{they} would generally condone or encourage, would in 1981 have added \$8.8 million to the amounts paid by customers in the six stores we had opened by the end of that year. In other words, they might have had to pay about an additional 30% for the same goods.

Sportmart Inc. and Resale
Price Maintenance Attempts

Sportmart has encountered many suppliers who are unwilling to deal with us because they say our prices are too low. I would like to give you several examples.

A popular manufacturer of dancewear telephoned a Sportmart buyer about complaints it had received from other dealers. The manufacturer stated that Sportmart's markup on these products was only 37%-40%, and that such a low mark-up was "damaging" other dealers. The manufacturer also said that it "could not continue to do business with Sportmart at these markups," and added that it "won't sell to people who discount."

In another instance, a maker of men's sport shirts asked if Sportmart would consider putting private labels on the clothing it sold to us. The company said it was responding to complaints and pressure from other dealers who sold at the "suggested" retail price.

Other suppliers have said much the same thing to Sportmart buyers. A designer and manufacturer of activewear called Sportmart to inform our buyers that its products must be marked at the suggested retail price. The manufacturer also complained that the prices at which Sportmart sells in California are too low and cause too many complaints from other dealers.

A bodywear manufacturer told our buyer: "Sell at retail or I won't ship any longer." Due to pressure exerted by other dealers, this manufacturer was fully prepared to stop selling to Sportmart if we did not raise our prices.

One manufacturer of underwater gear has never agreed to deal with Sportmart. While the manufacturer states this is because it "could not keep up with the demand" and therefore did not have enough products to distribute, Sportmart was unofficially informed that their underwater gear would never be sold to Sportmart so long as we re-sold below suggested retail price.

As Congress recognized in 1975 by repealing antitrust immunity for the Depression-era "fair trade" laws which allowed resale price maintenance, fixing resale prices is inherently anti-competitive and anti-consumer. For the record, I have attached a list of states which, even before Federal repeal, had acted on their own to drop state-imposed restraints on price competition. Congress and the courts have recognized that retail price maintenance hurts small business and raises prices. It seems clear to us that, in prohibiting state laws allowing resale price maintenance, Congress did not intend for Federal antitrust agencies to ignore well-settled law forbidding resale price maintenance, much less have those officials interject themselves into private lawsuits in attempts to undermine the law against resale price maintenance.

I have heard long theoretical explanations from these officials trying to distinguish what they are doing from an outright retreat back to "fair trade." They say they don't want to legalize resale price maintenance, only to allow such price-fixing from above when it happens to make economic sense to them.

From the very practical standpoint of someone who has been engaged in price-competitive retailing for many years, I can tell you that there would be no significant difference in the real business world between doing that and simply setting up "fair trade" laws again. If suppliers are free to prevent price competition among retailers who have bought from them, prices will shoot up and price competitors will be very badly hurt.

It is no help to say that an injured retailer can still go to court and try to prove the specific harm, not just to him, but to the overall manufacturing or distribution industry involved.

In the first place, the Federal antitrust agencies exist to prevent trade practices -- especially price-fixing -- which harm competitors. They should carry out their sworn duty, not leave the enforcement entirely to private parties.

Second, I have to challenge the views of some Federal antitrust officials that price competition among retailers is unimportant or not deserving of the law's protection. I'm sure it would not make any overall difference to these officials if suppliers' price-fixing

hurt or drove out of business a relatively small company like Sportmart. After all, in their view, there still might be plenty of manufacturers competing against one another, even if the consumer was forced to buy at uniformly high prices. And there might still be sufficient numbers of dealers selling those popular products at full price, even if price competitors were denied access to them.

But I refuse to believe that Congress, the courts or top-level White House officials would agree with the view that, as long as there would be adequate numbers of producers and distributors, distributors can have their resale prices dictated to them, and consumers can be subjected to higher, fixed prices. It just doesn't make business, economic or political sense.

Finally, if retail price-fixing is no longer clearly, automatically illegal, you will find few private parties with the resources to challenge retail price-fixing in the courts. Instead of the clear, well-understood, sensible rule that price-fixing is not permitted, victims of price-fixing will have to shoulder the crushing burden of making some tremendously complex -- not to mention tremendously expensive -- economic case.

Under present law, it is very difficult to make the factual case proving that resale prices are being fixed, but once that is shown, there is a clear remedy. However, if the law changed so that it is no longer enough to prove price-fixing, but further to require us to prepare a massive statistical demonstration of how price-fixing

affects entire industries, there will be few price-fixing victims able to support the heavy expense of litigating with the deck so stacked against them.

In March 1982, AGMC arranged a meeting with Assistant Attorney General William F. Baxter. I participated in that meeting and can tell you that Mr. Baxter very candidly told us then, as he told this Subcommittee last year, that he views with favor restrictive distribution practices, which we believe will lead to rampant retail price-fixing.

It would be difficult to imagine a step that would be more harmful to most of the nation's retail industry, or to the consumer it serves. In our view, such drastic and anti-competitive restrictions on a merchant's ability to choose the selling price at which he will offer merchandise to the public have no place in a competitive free market-place. Any steps to weaken current protections against resale price maintenance would severely harm Sportmart, as we have built our business on being competitive and pro-consumer oriented. Supplier-imposed bans on price discounting would inevitably bring higher retail prices and lead to increased inflation.

In 1975, Congress wisely abolished the long-criticized "fair trade" laws, which had for years restricted price competition. Numerous legal and economic studies at that time demonstrated the inequitable, inflationary and anti-competitive effects that followed legislation against price discounting. These sound arguments against "fair

trade" laws apply with equal or greater force against any new efforts to promote or encourage resale price maintenance.

If Federal antitrust officials refuse to enforce the law against illegal resale price-fixing, or weaken the law, it only stands to reason that there will be a dramatic impact on the prices consumers must pay. Price competition helps hold down the cost of living; a rebirth of resale price maintenance will be a new lease on life for inflation. That's the last thing our economy needs, particularly now. It is our belief that there is little, if any, evidence in the marketplace to justify the refusal of the Department of Justice or the FTC to enforce what we believe to be a clear legislative and judicial mandate. We view attempts by a government agency to go even further, and to announce a program of interjecting itself in private lawsuits to encourage retail price-fixing, as raising a major question on separation of powers. Until Federal antitrust officials are able and willing to persuade Congress into changing the law to condone or encourage resale price maintenance, I believe that the only permissible thing for antitrust officials to do is to enforce the law.

There's one last point I'd like to ask you to keep in mind. Of all the segments of the American economy, none works better, more efficiently or more competitively than the nation's system of distribution. Whatever problems some manufacturing industries may be having, the way we distribute and sell consumer goods is one of the great success stories in our economy.

Vigorous competition in a free marketplace means that American consumers have more choice, and can obtain more goods for less money than anywhere else in the world. And, price competition helps keep us all on the alert to develop newer, more productive and successful ways of doing business.

Since resale price maintenance is such an anti-competitive, anti-consumer trade restraint, I very much doubt that Congress would decide to encourage it. I certainly believe they should not. But any change from the current law against price-fixing should come from Congress, not the personal economic views of antitrust officials.

As we told the Assistant Attorney General, and in a later meeting also told FTC staff, allowing suppliers to dictate the prices which independent distributors may charge for their products ignores an entire century of experience. It would also deprive consumers of their right to compare prices and remove a central feature of the free competitive marketplace. We believe the realities of the marketplace are reflected in a long line of Federal court decisions, and in Congress' wise decision in 1975 to abolish the long-criticized, anti-competitive and anti-consumer "fair trade" laws.

Thank you for this opportunity to share our news with you, and for your help on this crucial issue to price-competitive retailers and the consumers they serve. With your help, price competitive retailers will retain this ability to offer consumers low prices.

Fair Trade Laws enactment and repeal dates:

<u>State</u>	<u>Enactment</u> <u>Date</u>	<u>Repeal</u> <u>Date</u>
Alabama	1939	1962
Arkansas	1937	1975
Colorado	1931	1976
Connecticut	1937	1975
Delaware	1937	1976
Florida	1941	1975
Iowa	1949	1975
Maryland	1935	1976
Mississippi	1938	1970
Montana	1937	1962
Nevada	1937	1965
New Hampshire	1937	1975
New Jersey	1935	1975
New Mexico	1937	1975
New York	1935	1975
North Carolina	1937	1975
Ohio	1959	1975
Oklahoma	1937	1976
Oregon	1935	1975
Rhode Island	1936	1970
Tennessee	1937	1975
Utah	1937	1975
Virginia	1958	1956
Washington	1937	1976
West Virginia	1937	1975
Wyoming	1937	1975
		1962

New U.S. pricing policy miffs some here

By Jan Ritter

If the maker of New Balance 420 running shoes had his way, retailers would sell them for \$47.95 a pair.

But Sportmart stores charge \$39.94. That's 17 percent off the suggested retail price. Such discounting saves consumers \$9 million a year throughout the country, Hochberg said.

Hochberg doubts that his President Larry Hochberg.

Thanks to a federal law that prohibits "vertical price-fixing," Sportmart can charge whatever it wants. Consumers are the winners, Hochberg said.

BUT THE Reagan administration is so sure the president's top economists argue that price-fixing sometimes helps consumers. So they have stepped up on prosecuting manufacturers who impose prices on retailers.

The new policy has angered many merchants and congressmen.

"They're trying to turn the clock back 30 years," Hochberg said. "Their theory is that if you make prices too rigid, they're too inflexible."

Central to the administration's position is the "free rider" theory. Here's a hypothetical example of how it works:

SAY A CONSUMER visits a full-service music store to learn about stereo. A salesman demonstrates them and explains their features. The consumer uses the information to decide what model he wants, but then buys it cheap

from a discount store. The retailer doesn't get his money back. He's left with a "free rider."

Hochberg calls the theory "unfair." Forcing a store to sell at a low price doesn't guarantee it will give more service. Consumers, he says, don't necessarily mean less business.

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Mr. LUKEN. Thank you, Mr. Hochberg.

Mr. Milstein.

Mr. MILSTEIN. Yes, sir.

Mr. LUKEN. Do we have your prepared statement?

Mr. MILSTEIN. Yes, I believe you do.

Mr. LUKEN. All right. Without objection, Mr. Milstein's testimony as well as Mr. Hochberg's will be received.

Mr. Milstein, you may proceed in any way that you think will be helpful.

You are Monroe Milstein, president of the Burlington Coat Factory, is that right?

Mr. MILSTEIN. That is right, sir.

Mr. LUKEN. All right, we are glad to hear from you.

TESTIMONY OF MONROE G. MILSTEIN, PRESIDENT, BURLINGTON COAT FACTORY WAREHOUSE CORP.

Mr. MILSTEIN. Thank you for letting me come before you gentlemen today.

We are headquartered in Burlington, NJ, and we started as a mom and pop business. My dad started in the wholesale business in 1924, and up to less than 10 years ago, we had one outlet in Burlington, NJ that did \$1.5 million a year worth of retail business.

Today the American dream has been fulfilled for us, and we have retail outlets in 20 States. I am here today not just for the Burlington Coat Factory, but also on behalf of the Association of General Merchandise Chains, which represents more than 20,000 discount, variety, dollar, off-price, family centers, factory outlets, catalog showrooms, and other general merchandise. These stores include some of the Nation's largest chains. However, 75 percent of our members meet the definition of small business currently proposed for our industry by the Small Business Administration.

Our association represents companies which are in every State of the Union, and last year accounted for over \$40 billion in retail sales. I come before you to voice our grave concern on how activities in Washington are aiding and abetting the illegal business practices of retail price maintenance or retail price fixing.

For over 70 years, retail price maintenance has been illegal per se, and an automatic violation once it is proved. The only exemption was a State's fair trade laws, which the Congress saw fit to do away with in 1975.

Any smart businessperson can tell you that generally you sell more units at a lower price than you can sell at a higher price. Higher prices force people out of the marketplace depriving them of the products they need, and thus slow down production lines of the economy.

Burlington originally got into the retail business when we had a huge surplus of coats during a warm October. We started to sell to the public at the factory site. The success of this sale enabled Burlington to sell the surplus, and restart manufacturing production again.

In 1972 the Burlington Coat Factory had retail sales of about \$1.5 million from one outlet. In 1983 we will do over \$200 million in retail clothing. A leading retail consultant estimated that in

1979 consumers spent \$3 billion in off-price purchases. In 1982 this had grown to \$8.5 billion. They project that by 1985, it will spurt to \$14.5 billion.

This growth points to the fact that more and more consumers prefer to shop at these lower-priced value-oriented retail stores.

A funny thing has happened to us in the last year or two. We have a Chairman of the FTC, an agency that is supposed to be the watchdog of the consumer, and has acted as such in the past, suddenly making statements that he wants to bring back selected price control in the form of retail price maintenance.

These very pronouncements to a congressional committee, at business meetings, and to the media has caused an increase in the pressure by retail stores and manufacturers to force them to stop selling to us, and other retailers of our ilk that give consumers better buys.

At first it was only in a few areas, but it has begun to snowball. The pressure continues to increase. We also have the head of the Antitrust Division of the Justice Department who feels he wants to bring back certain types of retail price maintenance.

He has gone so far as to intervene before the Supreme Court on behalf of a company found guilty of engaging in price fixing. He is asking the Court to broaden the Court ruling, so as to get a decision which would in essence allow retail price fixing. This is a blatant misuse of the taxpayers' money. Imagine using the taxpayers money to get a rule that forces the taxpayers to pay more for the products that they want to buy. This is hoisting them on their own petards.

When you have these two men so high up in Government coming out with these pronouncements, it is similar to a police chief telling his patrolmen not to give out any tickets for speeding. Everybody knows that when you go down a highway and you see a police car, the first thing you do is look at your speedometer and your foot comes off the gas pedal.

But actions by these two men have allowed attorneys to make recommendations to their clients to go to it. They are not going to enforce the laws. Even a reputable newsletter like Kiplinger put in one of his letters where there has been a change of attitude in Washington; now you can get away with things that were illegal before.

The law has not changed, gentlemen. Congress made the law, and Congress has not changed it. But these men in these positions have forced this erosion of the law. They are looking the other way, and they are sending out these signals. We see blatant forms of guarded conspiracy by the giants. The giants are advised by their high priced lawyers how to word it when they put the pressure on the manufacturers.

It is difficult enough as it is to get the law enforced, because the FTC has limited funds, and to bring legal suit is very expensive. Most small businessmen cannot afford it. Our legal costs up to this time have been in the vicinity of \$400,000, and we are still only in the discovery stage.

We are forced by more and more manufacturers who want to deprive us of their goods in certain areas throughout the country. Let

me give you a specific example to demonstrate to this committee the problem that we face.

A major department store chain with its headquarters in North Carolina warned our supply representatives that they did not want to see any of their branded merchandise in our Charlotte store. They were warned that they would be cut off from over 450 affiliated stores with a push of a button if they supplied us.

In a few months, every major brand was stripped from our Charlotte store. And in some cases the suppliers stopped providing goods to all of our stores.

[Pause.]

Mr. LUKEN. I would be very interested in these specifics. Proceed.

Mr. MILSTEIN. To prevent this illegal cutoff of merchandise from our stores, we had to sue under the antitrust law. Many other small businessmen could not afford to sue, and were forced into chapter XI or going out of business. The signals that these officials have sent out have encouraged major firms to place large ads in trade publications and other papers telling people not to sell to us, causing them to join with them. If that is not a conspiracy, I do not know what is.

A prime example is the Phillips-Van Heusen Corp., which owns large chains of clothing stores and is also a major producer of clothing. They were followed by heads of large department stores speaking at off-price seminars and investment seminars which were reported to the press.

The president of a leading department store was very bold in his statement. He made the statement that the manufacturers must decide whether they would sell to discounters or to full-price stores. If they had trouble deciding, they would decide it for them. The message is clear: You will lose all of our business if you continue to sell to people who give better value or sell for less. This is a blatant attempt to fix and restrain trade.

Mr. LUKEN. You think it is illegal in itself?

Mr. MILSTEIN. I believe that it is, sir. It is accomplishing a cartel or price fixing. The FTC says that they are investigating the North Carolina problem. It is now over 8 months, and we have not received an answer yet, but we are grateful. We were afraid that they were going to get a whitewash and blow it away. However, we are looking for the results. If we do not get results, we and others like us, and many smaller ones could be put out of business.

The Burlington Coat Factory today employs over 4,000 people. Because of efforts by us and other price competitors, shopping centers have been revitalized since additional people have gone back to work.

You know as well as I that a bargain creates business. Many times an article that you had no intention of buying when you see that it is a good buy, you buy it. Values create business. We are good for the economy; we stimulate the economy. We are good for production in the United States.

We feel that it is important that Congress sees that the law is carried out, so that all of this positive economic growth can continue.

On behalf of the Association of General Merchandise Chains and its many members, both large and small, we thank you for the op-

portunity to come before you today. We hope that this subcommittee will continue its praiseworthy efforts to ensure that the Federal antitrust agencies do not abandon the legal safeguards needed to stop illegal price fixing.

[Mr. Milstein's prepared statement with attachments follows:]

PREPARED STATEMENT OF MONROE G. MILSTEIN, PRESIDENT, BURLINGTON COAT
FACTORY WAREHOUSE CORP.

Mr. Chairman, members of the Committee, I am Monroe G. Milstein, President of the Burlington Coat Factory Warehouse Corporation, headquartered in Burlington, New Jersey.

I am here today on behalf of the Association of General Merchandise Chains, Inc. (AGMC), which represents the nation's discount and variety general merchandise retail industry, as well as for the Burlington Coat Factory. AGMC represents retail companies operating more than 20,000 discount, variety, dollar, junior department, family center, off-price, factory outlet, catalog showroom, and other general merchandise stores. AGMC members include not only many of the nation's largest retail chains, but also companies active in one or more regions of the country or in a few localities, or even a single store. AGMC member company stores are found in every state of the nation and last year accounted for well over \$40 billion in sales. However, nearly three-quarters of our members meet the definition of "small business" currently proposed by the Small Business Administration.

The Burlington Coat Factory Warehouse was begun by my father, Abe, as a wholesale coat business in 1924. This enterprise led us into retailing in 1972, the year we bought the old Modcraft Factory Outlet on Route 130 in Burlington, N.J.

I have been Chairman of the Board, President and a Director of the Burlington Coat Factory Warehouse since 1972. Prior to 1972, I was President of Monroe G. Milstein, Inc. ("MGM"), a wholesaler of outerwear located in New York and now a wholly owned subsidiary of the Burlington Coat Factory Warehouse.

I come before you today to voice the grave concern that AGMC and I share over the way that inaction by Federal antitrust agencies is aiding and abetting the illegal business practice of "resale price maintenance" (RPM) or "retail price-fixing."

The real victims of "RPM" are consumers and small businesses. The consumer loses the right to decide whether he or she is willing to pay higher prices in order to shop in a more luxurious store environment, or whether he or she prefers to buy at lower prices, with less ambience. I do not say a choice between service and price, because you will find that, in the garment business, this generally is not an issue. Our sales people provide just as much advice and assistance as do clerks working at a department store. Besides, you will find that many shoppers are willing to sacrifice certain things in order to get the best price possible. The price competition made possible by the long-standing legal ban on retail price-fixing has been beneficial for the consumer and the growth of small businesses. Conversely, "RPM" or legalized price-fixing eliminates competition and brings higher prices.

RPM is anti-consumer because it prevents consumers from having goods available at the price they want to pay, and, in many cases, the price they can afford. By comparison shopping, consumers who shop at price-competitive stores are able to obtain valuable information on the marketplace value of an item, and can compare prices on items of interest to get an overall sense of how different stores tend to price their goods. By eliminating price competition, RPM deprives consumers of this important information and forces them to pay higher prices.

Let's be honest with ourselves. Is the supposed service and setting of a traditional department store worth the differential in price? The bottom line to most is ... of course not. That is why we are having significant problems in the marketplace today. Some full-price stores have decided not to compete on the basis of price and are reluctant to face such competition.

But I ask you whether their business decision not to engage in price competition should prevent business like ours from doing so? And why should the Federal Trade Commission and the Department of Justice ignore violations of antitrust law when suppliers or other distributors try to prevent us from offering competitive prices? Additionally, should the FTC and Department of Justice be allowed to place our industry in the position of having to choose between losing access to the merchandise our customers demand or else become unwilling participants in a scheme to fix retail prices at an artificially high level?

I believe strongly in the rights of the consumer and that is why we decided to appear before you. We believe that it is important for you to understand our industry, and the Burlington Coat Factory, as well as why we have arrived at the point we are presently.

Retailing is a diverse, dynamic, and constantly changing and developing industry. It responds and adapts to changes in the economy, in technology and in society.

Department stores, specialty stores, variety stores, discount stores, catalog stores, off-price stores -- all represent innovations in merchandising that arose to meet consumer demand and which offer their own special combination of competitive factors, among them price, selection, location, hours, convenience, availability of credit and others.

Since World War II, discount retailers have recorded large gains in sales volume, as consumers responded favorably to their lower prices and streamlined operations. The general merchandise discount industry has grown to the point that Discount Store News, a respected trade publication, estimates that general merchandise discount stores alone will record \$73.3 billion in sales this year. This figure does not include the estimated \$8 - \$10 billion in sales that will be recorded this year by the rapidly growing off-price retail industry. Nor does that figure include general merchandise sales by the variety store industry (which exceed \$12 billion), by the catalog showroom industry (approximately \$10 billion), or any of the

many other stores (e.g., supermarkets, drug stores, specialty discount stores or others) which sell general merchandise below a manufacturer's suggested price. So this major issue for consumers and small business runs into hundreds of billions of dollars in annual sales and great number of jobs. Any assault on price competitive retailers will most certainly have a sizable impact on the nation's economy.

Off-Price Retailing - Its Birth and Present Status

Resale price maintenance poses a direct threat to all price competitive retailers, regardless of whether they operate discount department stores, specialty discount stores or other types of stores. As an off-price retailer, I would like to explain how my industry and my company operate and give you examples of how resale price maintenance harms us and the consumers we serve.

To understand why we see the tremendous upsurge in problems with resale price maintenance and the threat by big traditional retailers that they will drop manufacturers who do business with off-price retailers, it is necessary to look at the history of the off-price industry.

Off-price retailing is not new. It originated in the early 1900's when factories began opening up outlet stores on-site for their employees as a mechanism to discourage employee theft. Eventually,

many of the employees were bringing neighbors. As this business grew, the stores were eventually opened to the general public.

Economic conditions fanned the interest in the off-price industry. With the recession beginning in full swing in 1979, even middle and upper middle-income consumers were feeling the affects of the economic downturn. Consumers needed to stretch dollars and have items last longer. The quality of discount-store clothing was being raised at the same time.

In addition, fashionable designer labels were taking part of the market formerly held by established national brands. This movement, along with declining demand from their traditional customers of department and specialty stores, left American apparel-makers with extra stock in their warehouses.

As the recession dampened consumer spending, many department stores chose to avoid financial difficulties by ordering less and ordering later, thus putting the risk and the cost of carrying their inventory back on suppliers. This forced suppliers to look for new channels of distribution, to avoid having to cut back on production.

Some suppliers decided to open their own off-price or factory outlet stores. This move kept their manufacturing at a steady pace and assured them control of where their brands ultimately landed. Suppliers could also use their new outlets as a test lab for their new products.

Generally, the concept of all off-price stores is the same. Originally the off-price industry paid below-wholesale prices to purchase a manufacturer's surplus inventory, which many times consisted of past season's goods, overruns on current fashions, irregular or slightly damaged merchandise, canceled orders from full-price stores or mistakes, colors or styles that just did not sell. In some cases, the inventory even comes from department stores themselves if the stores find they have over-ordered.

All in all, the off-price retail industry has evolved from one which began by carrying distressed merchandise to the point that, in the last five years, 85 per cent of off-price merchandise today is first quality and 60 per cent is current season.

Off-price retailers are able to turn their inventories twice as fast as those of conventional retailers. As a result, off-price merchants can entice hard-pressed clothing manufacturers with offers of upfront cash orders.

When manufacturers agree to sell to off-price retailers, they will sometimes insist that their labels be snipped out or barred from markets too close to their regular customers. This pattern is diminishing, however, as competing lines appear in off-price outlets. Additionally, as off-price retailers themselves become major customers, they are demanding labels, which are critical to their success.

According to Michael Gade, Executive Vice President of the Doody Company, a retail consulting firm based in Columbus, Ohio, in 1979, consumers spent \$3 billion on off-price purchases. By 1982, the amount nearly tripled to about \$8.5 billion, or close to 7 percent of the total \$118.6 billion that consumers spent on apparel and footwear. It is projected that by 1985, off-price purchases will spurt to \$14.5 billion.

The marketplace is seeing significant changes by the growth of off-price shopping centers, some of which revitalized older shopping centers suffering from competition of nearby regional malls. To date there are over 100 of these centers now in full operation with new ones appearing all the time. Such groupings have made Reading, Pennsylvania and Flemington, New Jersey a mecca for off-price shoppers and tourist attractions. A partial listing of off-price malls in some representative states is attached to our statement.

The off-price industry has also been recognized as a tempting growth area by many established retailers. The Dayton-Hudson Corporation has recently opened the first of a chain of off-price apparel stores. K mart has opened Designer Depot stores, a prototype of an off-price specialty apparel chain. The well-known Filene's Basement of Boston plans to open at least 100 stores by the end of the decade. The F.W. Woolworth Co. has said it intends to expand its *J. Brannam off-price division. Zayre, Melville and other leading retail companies are now involved in off-price retailing as are many smaller chains and independent operators.

It is felt by many retail experts, that although off-price retailers presently have a very small share of the overall market, it is clear that off-price stores are no longer novelties born of the current recession. They see the new outlets reflecting a more fundamental shift in the distribution of consumer goods. Business people will not forfeit the opportunity to make a sale, which in turn benefits the consumer.

The proliferation of off-price stores is fundamentally altering the shopping habits of Americans and has threatened the nation's dominant retail institution, the department store. Consumers have been educated so that they now realize that a department store's traditional retail markup typically hovers around 50 per cent above cost.

Description of Burlington Coat Factory

Let me give you an overview of the Burlington Coat Factory and how we have grown from one store in 1972 to our present 38, with seven more planned for fall openings.

Over 4500 people are dependent on the survival of our company. That number will increase to over 5500 with our fall openings.

Burlington Coat Factory Warehouse Corporation now operates a chain of "off-price" apparel stores which offer a broad range of first-quality current brand name clothing and accessories for men, women and children. All of our merchandise is offered to customers at

prices substantially below traditional full retail prices generally charged by department and specialty stores for the same moderate to higher priced merchandise. The sales of irregular or discontinued merchandise represents only a small portion of our Company's business.

Marketing and Merchandising

At Burlington, we share the philosophy of many others in our industry. We believe that the wide selection of merchandise, in our case particularly outerwear, offered to customers at "off-prices" throughout the year is the primary factor contributing to our success. Most of the merchandise available at Burlington consists of first-quality current brand name apparel, virtually all of which is displayed and sold with original labels intact.

The sale of outerwear has accounted for more than one-half of our total sales during each of the past five years. We offer customers a complete line of men's wear (including suits, sport jackets, slacks and shirts), women's wear (including suits, blazers, skirts, slacks, blouses and sweaters) and children's wear (for infants, toddlers and pre-teens).

Numerous attempts have been made to disrupt the flow of goods to our various locations, a point I will discuss more fully later in my testimony.

In connection with our pricing policy, the ticket affixed to each item contains the Burlington's selling price as well as the price we believe to be a representative retail price of that item at traditional full-price department or specialty stores. In addition, we sometimes display department store advertisements from local newspapers to help customers make price comparisons while shopping.

Sales personnel in each store, although few in number, are available for those customers who desire assistance. This service is no different than that you would find in department stores. If customers were not satisfied with the level of service found at our stores, we would lose shoppers.

We advertise primarily on television and, to a lesser extent, in local newspapers. In our advertisements, the policy at Burlington is to stress offering our customers "off-prices," a wide selection of first-quality current brand name merchandise, and convenient store hours.

The Stores

The stores generally are located in close proximity to population centers, department stores and other retail operations and are usually established near a major highway or thoroughfare, making them easily accessible by automobile and other forms of transportation. All of the stores provide free parking. Our stores are generally located outside of urban centers. Many of our stores draw busloads of

shoppers from outside of the area, thus bringing in additional revenues to other local businesses.

At a number of our stores, a portion of the selling space is leased to unaffiliated companies which operate shoe, jewelry, linen and accessory departments.

Burlington Coat Factory Confronted with RPM

While I am testifying today on behalf of the Association of General Merchandise Chains, which represents many different types of price-competitive retail stores, all of which share a common position opposing resale price maintenance, I would like to comment on some problems which my company has encountered in the area of resale price maintenance. I believe these are typical of those being encountered by other price competitors. The Burlington Coat Factory Warehouse has been beset with problems of "resale price maintenance" or retail price-fixing for more than a half-dozen years, which coincides with the growth of our business in the marketplace. However, the problem has become more pronounced in the last two years.

In the 1970's Sharon Sez, Inc., a ladies' sportswear buyer, was a separate corporation whose majority stockholder was Burlington Coat Factory. Sharon Sez began doing business with Devon, a subsidiary of Interco Inc., in September of 1975. Devon filled Sharon Sez's orders for our Copiague, Long Island location which, at that time, was the only Burlington location having a Sharon Sez concession.

When Sharon Sez began to sell Devon merchandise in its new location at our store in Pine Brook, Devon advised Burlington that it would not supply that location, without specifying any reason.

Sharon Sez opened departments in two of our other locations. Devon agreed to ship to the one in our Lake Grove, Long Island store, but refused to supply the Paramus, N.J. location. In fact, to date, Devon supplies merchandise to Sharon Sez at both locations in the Long Island area and refuses to ship to the two New Jersey locations.

When Sharon Sez started to transship Devon merchandise from Long Island to New Jersey, Devon threatened to stop all dealing with Sharon Sez unless they agreed to restrict its Devon sales to the Long Island area. Sharon Sez reluctantly gave in to Devon's ultimatum.

It is our firm belief that Devon's ultimatum was the result of pressure from retailers, including R.H. Macy & Co., who were competitors of Sharon Sez in North Jersey. From a legal perspective, Sharon Sez's position and ours is that Devon's territorial restriction is unlawful under the "rule of reason" under the Sherman Antitrust Act.

Sharon Sez and Burlington Coat Factory also take the position that the restrictions were the result of collusion between Devon and other retailers to avoid Sharon Sez's price competition. Since the purpose and effect of the restrictions were to fix prices, these are per se violations of the Sherman Antitrust Act.

Sharon Sez felt that there were discriminatory discounts, rebates, and other allowances given to various Long Island retailers, but not given to Sharon Sez, and that these were violations of the Robinson-Patman Act.

In addition, Sharon Sez had similar problems with Queen Casuals, a subsidiary of Interco. In the fall of 1978, Sharon Sez first bought Queen Casual merchandise for all of its locations at the Burlington Coat Factory including those in New Jersey. A Queen Casual salesman telephoned Sharon Sez in the spring of 1979 and asked that their goods be removed from our New Jersey stores, as complaints had been received from various retailers in the area. Sharon Sez asked Queen Casual if the goods could be kept on the floor if our prices were raised to approximately the "keystone mark-up" being charged by most other retailers. The Queen Casuals salesman replied that this would solve the problem.

This conversation with the salesman made Sharon Sez an unwilling party to a retail price agreement that we feel is in clear violation of the Sherman Antitrust Act.

We began having difficulties with London Town Corporation, a subsidiary of Interco, who failed to supply us with any "London Fog" merchandise and also failed to supply us with clothing manufactured and labeled by Clipper Mist, another Interco subsidiary.

We believe that London Fog has bowed to pressure exerted by other retailers (including R.H. Macy and Company) in refusing to supply us with its merchandise. We feel that this concerted refusal of London Fog to deal with Burlington is also a violation of the Sherman Antitrust Act since its purpose and effect is to insulate our competitors from price competition.

London Town's Clipper Mist subsidiary has agreed to do business with Burlington, but only if the Clipper Mist label is not in the garment. Burlington feels that this restriction also violates the Sherman Antitrust Act, since it was arrived at in collusion with our competitors, and also violates the Robinson-Patman Act, because we are being discriminated against by being offered only a garment without a label, which is less valuable. At the same time, our competitors are obtaining Clipper Mist garments with labels at the same price.

In addition, we feel that the Robinson-Patman Act is further violated because we have been denied advertising allowances that Clipper Mist gave to our competitors.

Belk Brothers Pressures Charlotte Supplies

Our problems continued to increase when another major department store chain, Belk Brothers, Inc., became upset with our opening a retail outlet in Charlotte, N.C. in September, 1981.

Belk Brothers Company is a chain of retailers with several stores in Charlotte and Belk Stores Services, Inc., is a central buying operation for Belk and other members of the Belk chain which consists of over 420 stores throughout the southeastern and midwestern parts of the United States.

Shortly after we opened our Charlotte store, we began to hear from various manufacturers that they would prefer that Burlington not sell their merchandise in our Charlotte store. In fact, one dress manufacturer threatened to cancel business with us unless their goods were removed from the Charlotte store, because it had received complaints from Belk. We did not remove the goods, and the dress manufacturer in question fortunately backed down.

In November of 1981, a sales manager for Jonathan Logan asked us, as a favor, to remove Villager sportswear from the store in Charlotte because they also had received complaints from Belk. About the same time, top executives from Belk were observed by my employees taking notes as to what merchandise was being sold and at what price in our Charlotte location.

Late January of 1982, Jantzen's sales manager advised us that, in view of complaints about our low prices it was receiving from Belk and others, Jantzen was considering cutting off supplies to Charlotte and our other stores.

On January 22, 1982, Jantzen's regional sales manager specifically stated that, if Burlington was cut off, it would be because Burlington was running its good "off price" on a regular basis and Jantzen was receiving complaints from Belk and others. Ultimately, Jantzen decided to cut off our supplies, not only in Charlotte, but at all our locations nationally.

On January 28, 1982 and again on February 2, 1982 the president of Jonathan Logan's Misty Harbor Division informed us that Jonathan Logan would terminate all shipments of Villager and Misty Harbor merchandise unless we agreed to stop purchasing those lines for the Charlotte store. Misty Harbor's president stated that this ultimatum was being made because Belk had complained about Jonathan Logan merchandise being sold in Burlington's Charlotte store.

In late March of 1982, buyers from Burlington visited the Charlotte Merchandise Mart to meet with local salesmen for various suppliers in an effort to obtain goods for our Charlotte store. They met John Philip of Breckenridge, Michael Emory of Personal Sportswear and Henry Moore of Jones Apparel Group, Inc. Each of these salesmen refused to accept orders for the Charlotte store, expressly because they feared retaliation from Belk if they sold to a discounter in Charlotte.

In or about October, 1981 it came to Burlington's attention that Belk had cancelled an order for approximately \$40,000 worth of White Stag merchandise expressly because White Stag was supplying

Burlington's Charlotte store. During the next buying season in January, 1982, White Stag refused to ship merchandise to any of our stores. White Stag persists in its refusal to ship to the Charlotte store, although it subsequently agreed to ship to our other locations.

It was clear to us at Burlington that the manufacturers' refusal to supply our Charlotte store resulted from collusion with Belk to insulate Belk from the price competition Burlington has introduced. Such agreements not to deal with us, we believe, are aspects of a price-fixing scheme in violation of the Sherman Antitrust Act.

After litigation was commenced in 1982, Burlington learned additional information about the Belk organization which indicates the means through which Belk puts pressure on manufacturers to prevent shipments to discounters or others with whom Belk does not want to compete.

As the central buying office for the Belk chain, Belk Stores maintains a list of "recommended resources." It is our understanding that these so-called "recommended resources" are the only manufacturers from whom Belk chain members are permitted to buy. Displeasing Belk, or one of the large constituents of the Belk chain, can result in a manufacturer being removed from the recommended list. It is not difficult to see how Belk is in a position with over 400 stores to exert substantial pressure on manufacturers for them not to sell to Burlington and other discounters.

Since the lawsuit was commenced, Burlington has succeeded in settling the case with Jonathan Logan, Jones Apparel, The Leslie Fay Company, and Interco, Inc. Burlington is continuing to press the case against the Belk defendants, Jantzen and White Stag. The case is presently in the discovery phase of litigation.

Ocean Pacific Requests "Keystone Mark-up"

However, our problems did not cease with Belk. Burlington started purchasing the Ocean Pacific line in 1980. In the fall of 1981, a regional sales manager for Ocean Pacific told us that it was receiving complaints from other retailers about Burlington's low prices. The regional sales manager advised Burlington that we would not receive Ocean Pacific merchandise in the future unless we agreed to resell the goods at the "keystone mark-up" followed by most other retailers.

Faced with the loss of this business, we had no option but to reluctantly agree to raise our prices to equal those of our competitors.

Subsequently, we decided that it was inconsistent with our overall pricing policy to sell Ocean Pacific merchandise at such high prices. Accordingly, I ordered our stores to begin selling Ocean Pacific at the low mark-up we employ for all of our other merchandise. We assume that Ocean Pacific learned of Burlington's low prices, either because other retailers continued to complain or because Ocean Pacific salesmen visited our stores and checked the pricing of Ocean Pacific

merchandise. In any event, Ocean Pacific abruptly refused to conduct any further business with Burlington in the spring of 1982, and has declined to resume dealing with us since then.

We feel this termination was a result of our failure to adhere to the unlawful price maintenance agreement Ocean Pacific had foisted upon us.

This precipitated a lawsuit. The Ocean Pacific case consists of alleged violations of the Sherman Antitrust Act because of the retail price maintenance agreement Ocean Pacific extracted and also because Ocean Pacific, in collusion with other retailers, refused to deal with us.

Non-Enforcement Damages Industry and Hurts Consumers

The Association of General Merchandise Chains and the Burlington Coat Factory believe that the lack of enforcement by the FTC and Justice Department has exposed price-competitive retailers, large and small alike, to increasing examples of pressure similar to what I described above. The problem resembles the situation of highway motorists. If a police car is in view or there's a chance of being ticketed, most people obey the speed laws. But if you tell drivers that the police are not going to ticket for speeding, they eventually drive faster and faster, breaking the law. This is exactly what is taking place in the marketplace. The industry is fully aware of public pronouncements by FTC and Justice Department officials

opposing enforcement of antitrust law prohibiting resale price maintenance, as well as some Justice Department filings in private litigation challenging the law. As a result, they have little fear of being "hailed over" by Federal antitrust agencies for illegal acts.

In order to cope with this problem, we found it necessary to expend over \$400,000 in lawsuits to try and protect not only my business, but the rights and interest of our customers. Unfortunately, the lawsuits are basically at the discovery level and will probably drag on for some time. Our unique experience in the coat business as a wholesaler for 38 years gave us the base to ride out the difficult times and survive. Additionally, we have used numerous resources at our disposal in order to guarantee that the consumer can shop at Burlington and continue to purchase first quality name brand goods.

Just imagine what would happen to a smaller business with less financial wherewithal and without similar resources for locating other merchandise sources. You will find many of them threatened with potential extinction. How many small businesses can afford to have a law firm at their disposal responsible for seeing that supplies continue with little interruption? We dare say that there are few in the marketplace. Fortunately for us, the timing of events and our fiscal stability was such that we have been able to continue to provide the public what it wants.

We believe that the growing problem of resale price maintenance for the Burlington Coat Factory and for other price-competitive retailers

correlates to the recent track record of non-enforcement of the law against retail price-fixing by the two key Federal agencies mandated to protect the consumer and business from unlawful competitive practices. Attached to our testimony is a report prepared by FTC Commissioner Pertschuk for Senator Lautenberg of New Jersey, which we believe clearly demonstrates that in this area of the law, "the police no longer ticket speeders."

There is strong support for Commissioner Pertschuk's analysis of non-enforcement of antitrust activities, especially as it pertains to resale price maintenance. We submit the following staff summary for the Subcommittee on Oversight and Investigations sent June 22, 1983 to the Honorable John D. Dingell, Chairman, Subcommittee on Oversight and Investigations; and the Honorable James J. Florio, Chairman, Subcommittee on Commerce, Transportation and Tourism. That report states in part:

"The FTC and Resale Price Maintenance:
The Failure of Majority Rule"

Resale price maintenance is one form of price fixing. The practice violates Section 1 of the Sherman Act ... It, therefore, also violates Section 5 of the Federal Trade Commission Act. Resale price maintenance is a form of "vertical" restraint of trade; that is, it concerns an unlawful combination not between direct competitors, but between manufacturers and distributors to limit the prices at which the manufacturers' goods will be sold. These agreements may be

expressed ... or they may be implied from the circumstances, as where a manufacturer distributes "suggested" price lists and then enforces them through various means.

In either case, once the elements of an agreement have been found, the courts have condemned this form of price fixing as a per se violation of the Sherman Act.*/...

This report will not deal with the merits of the dispute, but will assess what has happened to resale price maintenance law enforcement at the Federal Trade Commission in light of it. In a letter response to Chairman Dingell's February 17, 1983 request, Commission Chairman Miller supplied enforcement statistics that permit a comparative evaluation of his administration's enforcement in resale price maintenance in contrast to that of his predecessors'.

The data contradict Chairman Miller's assertion in testimony delivered on March 8, 1983, before the Subcommittee on Commerce, Transportation, and Tourism that the Federal Trade Commission "continues to bring RPM cases". They also contradict his representation that resale price maintenance enforcement was as limited during the tenure of his immediate predecessor, Michael Pertschuk, as during Mr. Miller's tenure.

*/ The leading case is Dr. Miles Medical Co. v. John D. Park & Sons, Co. 220 U.S. 373 (1911). In Continental T.V. v. GTE Sylvania, 433 U.S. 36 (1977), the Supreme Court stated:

"The per se illegality of (vertical) price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy (than does nonprice vertical restrictions)... Furthermore, Congress recently has expressed its approval of a per se analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair trade pricing at the option of the individual states. Consumer Goods Pricing Act of 1975, Pub. L. 94-145 (1975), amending 15 U.S.C. S 45(a). No similar expression of Congressional intent exists for nonprice restrictions." (443 U.S. at 51, n. 18). The Court's most recent opinions have only underscored the per se illegality of resale price maintenance. Rice v. Norman Williams Co., 50 U.S.L.W. 5052 (U.S. July 1, 1982); Arizona v. Maricopa County Medical Society, 50 U.S.L.W. 4687 (U.S. June 18, 1982); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

However, the number of Commission "complaints" issued alone is never fully descriptive of its enforcement activity. Reference to the Exhibits to this report shows a substantial number of investigations which led to 16 final consent decrees, that achieved the same effect

as final litigated orders during the 1977 through 1979 period mentioned by Chairman Miller in his testimony. In sum, our inquiry has revealed the following:

1. The Commission's current law enforcement activity in the area of resale price maintenance has dramatically declined as compared to the previous two Chairmen's administrations
2. The Commission has not been presented with and has not approved a single formal resale price maintenance adjudicative complaint since Chairman Miller came to the agency in October 1981.
3. The Commission has provisionally approved only one new resale price maintenance consent agreement since Chairman Miller arrived, the substance of which was completed in the previous administration.
4. Chairman Miller's Bureau of Competition has refused to approve virtually every staff request to upgrade resale price maintenance investigations presented to it from preliminary to formal status.

5. Despite the fact that a majority of the Commission adheres to the view that the agency should prosecute resale price maintenance as a per se violation of law, Chairman Miller has effectively stymied that majority view through his power to appoint and remove the Bureau of Competition's Director, to dictate its enforcement program, and even through his exercise of the power to put a matter "on hold" to forestall a Commission vote.

These conclusions rest upon a review of the available indicators of Commission enforcement activity, both public and nonpublic. There are two essential sources of hard information: Formal Commission actions and staff investigations.

The long-established absolute prohibition against resale price maintenance has shaped the competitive structure for the distribution of goods in the United States. Due to this absolute prohibition against price-fixing agreements, sellers have been aware of the limits on their power with respect to their customers pricing decisions. Buyers have understood that, if they suffer harm as a result of resisting a manufacturer's attempt to fix resale prices, as we have done, they have potent legal remedies available that make their opposition to illegal action economically feasible. They also know that, if they join in a price-fixing scheme, they risk civil and criminal penalties. The history of court decisions and the repeal in 1975 of "Fair Trade" laws by Congress has clearly delineated

that Congress does not condone price-fixing of retail prices. The clearly settled ban on price-fixing makes it possible for business entities at all levels of distribution to go about their business with an understanding of what is and what is not legal.

It is the responsibility of the Congress to change antitrust laws, not Federal agencies by fiat. But the success of Federal antitrust officials in creating the perception that the law has already changed can be seen in the April 29, 1983 edition of The Kiplinger Washington Letter. It states:

"Antitrust policy is subtly different from what it used to be.

It is being reshaped by this administration and by the courts. Many things that were once the cause of a lawsuit are acceptable now. There is much less theorizing by gov't attorneys...plowing new fields.

If business practices promote COMPETITION, fair competition, they are not likely to be frowned on by gov't antitrust lawyers now.

A few examples: Vertical restraints are being eased slightly. A producer, for instance, may require distributors to carry his product and not a competitor's ... if the competitor's is available in the area.

Resale price maintenance is permitted under certain conditions. Perhaps to help introduce a new product or compensate for demonstration.

Selling to discounters may be curbed, even when the discounter is getting his stock from another retailer. The latter may be cut off.

Open defiance of the law by groups desirous of eliminating discounters and off-pricers has become more evident in the last few months. The enclosed newspaper advertisement by Van Heusen Corporation in Women's Wear Daily and statements by some department store officials leave nothing to the imagination. It is clear that statements by large full-price retailers that they will not do business with suppliers who sell to price-competitive retailers harm competition in several ways. First, this sends a clear signal to suppliers that they must sell only to their customers with the highest retail price. In addition, it also signals those high-priced retailers not to attempt to engage in price competition; if they do, they face having supplies of their brand-name goods cut off. Open warfare is in fact being declared while the Federal government quietly sits on the sidelines.

Lawrence Phillips, President and Chief Executive Officer of the Phillips-Van Heusen Corporation, which both operates apparel stores and manufactures apparel products, spoke to the Menswear Retailers of America on March 22, 1983. There he said:

"The first thing that our own retail stores must determine is whether each of their branded suppliers are sincerely interested in building a business with our type of retail stores, or whether they are out to sell as much goods as they can to whomever they can regardless of what such sales may do to the image of their brand.

The critical judgment which the heads of each of our retail groups must make is to judge on which side of the street each supplier chooses to walk, knowing that in our industry a manufacturer cannot walk on both sides of the street. Included in this judgment factor should be the businesslike realization that each of our resources must find a way to rid himself of his surplus old inventory. The solution to this problem starts with the quantity of merchandise that must be closed out. Any manufacturer who consistently mismanages his business to the point where he cannot close out his surplus merchandise, primarily through his regular accounts or his own outlet stores, is not a responsible resource. This judgment should not be based on a short term problem that any manufacturer might face in a recession, or product or style change, and a grace period should be allowed so that an important supplier is given time to clean up his act."

This amounts to a not-very-disguised invitation to competing manufacturers to hold down production and limit distribution so that they can maintain artificially high prices.

Manufacturers' resale price maintenance programs, if sanctioned by the FTC and Justice Department, could eliminate all price competition among retailers of a product. RPM agreements strike directly at the fundamental competitive strategy used by price-competitive retailers like myself, who offer consumers an alternative to high-priced distributors. The lower-prices that we as an industry offer assure that consumers retain the freedom to choose whether they value the combination of image, convenience, promotion and service offered by higher priced distributors more than they value the combination of those factors, together with a strong price emphasis, provided by price-competitors like the Burlington Coat Factory.

Since the elimination of "fair trade" laws, the business community has been free to offer both types of distribution, based on their view of which format will be most attractive to consumers and maximize sales. We believe strongly that, prior to our recent problems with RPM, we saw much development and growth of innovative forms of retail competition. The consumer benefitted and the marketplace grew. However, those members of the industry attempting to reinstitute RPM through Federal assistance are in many cases businesses that continue to operate as old dinosaurs, refusing to modernize their operations and management practices.

Why should the consumer be penalized for the intransigent unwillingness of some producers and distributors to compete in the marketplace by meeting consumers' preferences?

As regards the filing by Justice Department officials in Monsanto Company v. Spray-Rite Service Corporation, which will be heard before United States Supreme Court this fall, our interest in the outcome of this Supreme Court case essentially stems from our concern that any retreat from this court's view that resale price maintenance (price-fixing) is a per se violation of the Sherman Antitrust Act would have a devastating impact upon the consumer and the discount industry.

AGMC, Burlington Coat Factory, and others have filed opposing briefs because we are deeply troubled by the anti-consumer position taken by Department of Justice in filing on the side of a company already found by two lower courts to have engaged in price-fixing. The Justice Department has requested that this case be used as a means of reinterpreting, and thus abandoning, 70 years of established policy that has deemed resale price maintenance (price-fixing) agreements per se illegal. We also believe that this is a blatant misuse of taxpayers' money.

If it were not for the strict antitrust policy against retail price fixing, many other manufacturers would undoubtedly have terminated sales to Burlington Coat Factory and other similar discounters or

forced us to adhere to high, uncompetitive prices which do violence to our industry's fundamental marketing philosophy.

In addition to Burlington Coat Factory, the Association of General Merchandise Chains, and other retail trade associations and companies, thirty-eight State Attorney Generals and numerous members of Congress from both parties have joined in filing amicus curiae briefs. They are all deeply concerned by the attempt of the Justice Department to use the court to contravene the will of Congress and its express legislative intent regarding resale price-fixing as being per se illegal.

Conclusion

We must restore a balance in the marketplace by insuring that Federal agencies, with a legal and public mandate, enforce the law as it is written. Although all of us recognize that the Federal government is operating with a limited budget and having to spread this scarce resource around, enforcement is needed to prevent further growth of illegal "price-fixing" activities.

Everyone must keep in mind that the consumer too is working with limited financial resources. Isn't it ironic that the most successful store in our chain in 1982 was our Detroit location in an area that has an unemployment rate of 20%? That by itself tells you why our industry must be protected from illegal anti-competitive activities.

If the FTC and Department of Justice do not agree with the law and want to change it, then let them come to Congress with legislative recommendations. We believe that close scrutiny by Congress and the public will show that abstract theories of those who would change the law and permit retail price-fixing cannot stand up to the realities of the marketplace.

In the meantime, FTC Commissioners and the Assistant Attorney General have a sworn duty to uphold and enforce settled antitrust law, regardless of their personal views. Without the enforcement of the long established per se ban on resale price maintenance, there will be no crucial safeguard for consumers, distributors and the competitive free marketplace. Their retreat from enforcement is beginning to have severe economic consequences.

Congressional intent and a clear judicial history must continue to be the cornerstone of protection.

On behalf of the Association of General Merchandise Chains, I would like to thank you for providing me with the opportunity to share with the Subcommittee our deep concern over Federal inaction in the face of attempts to prevent retail price competition. We hope that the Subcommittee will continue to support its praiseworthy efforts to ensure that Federal antitrust agencies do not abandon the legal safeguards needed to stop illegal retail price-fixing.

BURLINGTON COAT FACTORY

ROUTE 130 NORTH

BURLINGTON, N. J. 08016

(609) 386-3314

EXHIBIT OF OFF-PRICE SHOPPING MALLSCALIFORNIA:

1. Castroville Station Shopping Mall, Castroville, CA;
2. Loehmann's Plaza, Fullerton, CA;
3. Oakbrook Village Shopping Center, Laguna Hills, CA;
4. Old Mill Specialty Center, Mountainview, CA;
5. Loehmann's Plaza, Reseda, CA;
6. Palm Springs Square North, Palm Springs, CA;
7. Zinfandel Square, Sacramento, CA;
8. Canyon Shopping Center, Sherman Oaks, CA;
9. Loehmann's Plaza, Sunnyvale, CA.

INDIANA:

1. Fort Wayne Promenade, Fort Wayne, IN;
2. Promenade at Glen Brook, Fort Wayne, IN;
3. Southtown Mall, Fort Wayne, IN;
4. Hammond Outlet Mall, Hammond, IN;
5. Eastgate Consumer Mall, Indianapolis, IN;
6. Two West Washington, Indianapolis, IN;
7. Century Consumer Mall, Merrillville, IN;
8. Evergreen Business Center, Merrillville, IN.

KENTUCKY:

1. Scottsville Square, Bowling Green, KT;
2. Indian Trail Square, Louisville, KT.

MINNESOTA:

1. Northway Shopping Center, New Brighton, MN;
2. Lexington Plaza Center, Roseville, MN;
3. St. Croix Outlet Mall, St. Croix, MN;
4. Sibley Plaza Shopping Center, St. Paul, MN;
5. Southview Shopping Center, South St. Paul, MN.

OHIO:

1. Union Terminal Outlet, Cincinnati, OH;
2. The Mart Factory, Dayton, OH;
3. The Factory Outlet Mall at Kings Island, Kings Island, OH;
4. The Mentor City Shopping Mall, Mentor, OH;
5. Mid-Ohio Factory Mall, Newark, OH;
6. Township Outlet Mall, Painesville, OH;
7. North Town Square, Toledo, OH.

TEXAS:

1. Parkdale Plaza, Corpus Christi, TX;
2. The Factory Outlet, Dallas, TX;
3. Sherman Factory Outlet Mall, Sherman, TX;
4. Texas Outlet Mall, San Antonio, TX.

Mr. LUKEN. You have cited instances where the factual situation clearly amounts to an agreement. That is where there is contact between the retailer and the manufacturer with a resulting restraint in dealing with the discounter or your company. It would seem that those facts would amount to an agreement that would come under the coverage of the law.

But in the case where, as you say, it is blatant, it certainly has been open, where the manufacturer or the retailer, either one, makes the announcement we are not going to deal with manufacturers who deal with discounters.

On the face of it, that is not an agreement. That is a unilateral statement. I am asking, does that become illegal? It is a different issue, I think, from the question which is certainly an issue, from the question that is posed where the Justice Department said, even though there is a price maintenance agreement, it may not, depending upon the application of the rule of reason, proceed with the case even where it finds such agreement.

Mr. MILSTEIN. Sir, I can only tell you my experiences. The No. 1 marketing organization in America today is Procter & Gamble, which as you well know is from Ohio.

Mr. LUKEN. Cincinnati?

Mr. MILSTEIN. Cincinnati! And as you well know, under the law, they obey the law. And today they sell their products to anybody regardless of what price they sell it, and they are doing more and more business every year.

The business of business is to do business. When you have that statement made by the head of a leading department store chain, and the following week presidents of other leading department stores, presidents and chairmen of the boards of these other department stores who may not have been in the buying market for maybe 20 years, suddenly go into the marketplace and they want to see the head of each corporation, and they say to them what is your policy on selling to retailers, it is like carrying a gun.

First you post a sign saying one thing, and next you walk in with a gun. They are doing it not one at a time, but they are doing it coordinated.

Mr. LUKEN. Who is doing this?

Mr. MILSTEIN. Presidents of leading department stores following that statement made in the paper.

Mr. WEBER. Will the chairman yield?

Mr. LUKEN. Yes, I yield.

Mr. WEBER. Which companies?

[Pause.]

Mr. KASSNER. We are starting a law suit on Friday involving these companies.

Mr. WEBER. What you just said was fairly serious. You just said that the presidents of certain major companies are getting together and deciding to do this.

Mr. KASSNER. The chairman of the board of one of the largest department store chains in the United States for the first time in 22 years went into the children's clothing market, and asked heads of manufacturing corporations what their policy is with respect to sales to discounters.

Now this follows the public announcements in the newspaper by one major retailer and one vendor stating that they will not deal with people who deal with discounters.

Now all of this, I do not know if you would call it conscious parallelism. I do not want to put a phrase on it.

Mr. LUKEN. Would you hold that thought for a minute. The statements in the newspaper were by whom?

Mr. KASSNER. There was one 2-page announcement by a major department store retailer.

Mr. LUKEN. Who?

Mr. MILSTEIN. The 2-page announcement was by Phillips-Van Heusen which owns several chains of stores.

Mr. LUKEN. Van Heusen?

Mr. MILSTEIN. Phillips-Van Heusen, Van Heusen shirts, et cetera.

Mr. LUKEN. Van Heusen is a manufacturer.

Mr. KASSNER. On one side of the page, they spoke as vendors.

Mr. MILSTEIN. By the way, excuse me, the ad is provided, the text, to be entered into the record.

Mr. KASSNER. On one side of the page, they spoke as vendors. They said that they would not sell to anybody who is a discounter. On the other side of the page, they spoke as retailers, that they would not buy from anybody who sold to retailers.

Mr. MILSTEIN. To discounters.

Mr. KASSNER. To discounters, right. They had a 2-page ad in the newspaper saying exactly this. There are other aspects to Phillips-Van Heusen. Because Phillips-Van Heusen is a competitor if they own retail stores.

Mr. WEBER. Would the chairman yield further?

Mr. LUKEN. Surely.

Mr. WEBER. My question to you, Mr. Kassner, is in view of the specific statement made by Mr. Milstein, a number of presidents got together and decided this. If that is the case, is that not an illegal activity under other antitrust statutes on price fixing?

Mr. KASSNER. From the FTC point of view, they would probably say no. Because these people did not conspire to do this. In other words, Phillips-Van Heusen just took ads in the newspaper and said something. Now Phillips-Van Heusen did not necessarily go into the market. Major corporate heads of other corporations went into the market.

Phillips-Van Heusen no longer had to go into the market. They said if you sell to a discounter, we will not buy from you. If you buy from a discounter, we will not sell to you. They did not have to go into the market and tell anybody anything. They already made their pronouncement in the newspaper.

Mr. WEBER. But that is not the same as Mr. Milstein said when he told us that presidents of major companies basically sat down together and discussed this.

Mr. KASSNER. A president of a major company, I do not see the distinction. If a buyer did this, and he went to a merchant and a vendor, and he said to the merchant, before placing our order, we would like to know what your policy is with respect to sales to discounters.

Now it was aggravated by the fact that instead of the buyer doing this, the head of the corporation did this. When you look at the limitations of Colgate, it might be perfectly proper for you to go in and inquire what are your policies with respect to sales to discounters. Have you an announced policy? If you have an announced policy, what is that announced policy?

If it is proper to announce the policy, it should be proper for someone to ask you what your policy is. That is the theory they are using. They are getting advice now from very high powered law firms which they never got before. The advice is that you can use the word price in your vocabulary. There was a time and not so long ago, last year, where the subject of price was an unmentionable. It is no longer an unmentionable. The reason that it is not an unmentionable is because of the FTC announced attitude toward per se and rule of reason.

When you get a Kiplinger letter——

Mr. LUKEN. Per se versus rule of reason?

Mr. KASSNER. That is right. When you get a Kiplinger letter that misstates the law to such an extent, where they say there is no longer a per se rule, that it is now a rule of reason, when you are talking about minimum price fixing, if the Kiplinger letter says this, then I can understand why a Donovan & Leisure might start advising its clients that you use the word price in your vocabulary.

Last year you could not use the word. No vendor could use it. He might think it, but he would not use it. Today they are using the word price, and that is a direct ramification of Government policy alleged change manifested by FTC and Justice, and that is why we are here today.

Mr. LUKEN. Is Colgate based on price?

Mr. KASSNER. Colgate stated a very simple principle in a capitalistic country which sounded very good then. They said that people could deal with whomever they chose to deal with. Now this Colgate decision has been limited.

Mr. LUKEN. Do you know if the facts involved price considerations?

Mr. KASSNER. Well, I do not believe that they did. I have not read Colgate in 7 years, but Colgate has been limited.

Mr. LUKEN. 1919.

Mr. KASSNER. That is a long time ago.

Mr. LUKEN. That was the date of the petition.

Mr. KASSNER. Surely, nobody would say that Colgate means that if you do not like a black skin, you can refuse to deal with a person; or if you do not like a national origin, you can refuse to deal with a person; or if you do not like the sex, you can refuse to deal with the person.

Nobody would say that, and Colgate did not mean that, and Colgate did not say that. There are criteria by which you cannot refuse to deal with people. I would suggest that one of the criteria is that where there is a sole basis of maintaining minimum resale prices, I do not think that the vitality of Colgate still exists.

And Colgate clearly speaks about the policy and nothing more. I do not believe that you can find a pure case where there was policy and nothing more. I think that the placing of the ad in the newspaper is something more.

Mr. MILSTEIN. I would like to add, sir, that besides placing the ad in the newspaper, Mr. Phillip of Phillips-Van Heusen spoke to the Menswear Retailers of America on March 22, 1983, where in effect he said the same thing.

Now one of the strange things to me, Mr. Baxter was quoted that he wants to bring back retail price maintenance on the vertical level, but he said that I do not think that two retailers should even have lunch together, that makes them suspect.

Not only are they having lunch together, but they are having meetings. They are announcing their policy. They spoke to their lawyers, go ahead and say it this way, and the manufacturer, he will know what you mean. They are intimidating the manufacturers. They are doing what they want to do with high power legal advice, and they are circumventing the American public.

Mr. LUKEN. If the gentleman from Minnesota would yield further for a moment.

You are referring to Mr. Phillip's statement on March 22, of Phillips-Van Heusen?

Mr. MILSTEIN. That is right.

Mr. LUKEN. There he was speaking principally as a manufacturer, was he not?

Mr. MILSTEIN. I will have to read it. He wears two hats, as you know, with the ad and everything.

Mr. LUKEN. When he is speaking as a manufacturer.

Mr. MILSTEIN. Well, the quote that I have—

Mr. LUKEN. If he was speaking both, all right.

Mr. MILSTEIN. The quote that I have:

The first thing that our own retail stores must determine is whether each of their branded suppliers are sincerely interested in building a business of our type of retail stores, or whether they are out to sell as much goods as they can whenever they can regardless of what such sales may do to the image of their brand.

Mr. LUKEN. If we can separate it, and of course it hopelessly confuses the situation when we use this as an example, since he is both a manufacturer and a retailer, and we must try to separate it somewhat for our principals. I do not think that we are going to pass laws that describe combination manufacturers and retailers.

Mr. MILSTEIN. Many conglomerates today are combination manufacturers.

Mr. LUKEN. Well, maybe we cannot pass any laws, I do not know. But let us try to separate that, and insofar as he speaks as a manufacturer, when he made that statement, that did not arouse you too much, it was not that unexpected, was it?

Mr. MILSTEIN. Sir, it was totally unexpected. Because Van Heusen has sought us out to sell us, and was doing business with us. It was totally unexpected.

Mr. LUKEN. Then it was compounded when the chairman of the board of a retailer went out and started utilizing this or inquiring, or was this a manufacturer?

Mr. KASSNER. A retailer.

Mr. LUKEN. A retailer, a department store retailer?

Mr. KASSNER. Yes.

Mr. LUKEN. They went and asked the manufacturers like Mr. Phillip, maybe not him specifically, what their policy was. You have linked those two, have you not?

Mr. KASSNER. The only thing that I can link is the inference.

Mr. LUKEN. But that was the instance that you cited?

Mr. KASSNER. Yes. When a man puts an ad in the paper that is reproduced in *Women's Wear Daily*, you assume that every merchant reads it. You assume that if they act, they act accordingly, although you cannot prove that they spoke to each other.

Mr. LUKEN. I am trying to separate the two. And I appreciate the problems over and above the fact that this gentleman wears two hats in the conglomerate role of the corporation. I will yield back to the gentleman from Minnesota.

Mr. WEBER. I just want to follow up on one issue. You indicated that you are going to file a lawsuit on Friday?

Mr. KASSNER. This is on behalf of another client.

Mr. WEBER. You are going to file a lawsuit alleging some violation of antitrust law?

Mr. KASSNER. Yes, that is correct.

Mr. WEBER. The Justice Department will have to respond to that?

Mr. KASSNER. It is a private antitrust suit. The Justice Department has nothing to do with it.

Mr. WEBER. Do you believe they will enter the suit in any way?

Mr. KASSNER. Who knows what suit the Justice Department will or will not enter. If they entered the Monsanto suit, they can enter almost anything.

Mr. WEBER. I guess I am wondering to what degree that indicates that the antitrust laws may be working, or at least to provide you with some avenue.

Mr. KASSNER. The antitrust laws could work for very, very wealthy people. They do not work for poor people. I had a client who wanted to sue a major chain of department stores who are now in chapter XI. And he claims primarily as the result of a cutoff of goods initiated by that department store because he opened up a discount department store 4 miles from the premier flagship store of this department store chain in North Carolina. Now the antitrust laws did not do him much good.

Mr. WEBER. So what you are saying is that the antitrust laws are inadequate protection for people like you?

Mr. KASSNER. Well, it would not have been adequate for Mr. Milstein 8 years ago or 10 years ago. It is adequate for him today, if he has his own lawyers, and can enforce them, and if the Justice Department does not come in as *amicus curiae* on the other side; and if the FTC does not by administrative fiat put more pressure on my clients by announcing policies which are a direct contravention of what I think is the clear intent of Congress as manifested by the appeal of the fair trade laws.

Mr. WEBER. Just to follow up, in your judgment, would there be any small operators—I do not like to call them poor people, because I do not think that most of those small businessmen are really poor—but very small operators, maybe single outlet operators, that would be adversely impacted by your position?

Mr. KASSNER. Not that I know of.

Mr. WEBER. Boutiques, or something like that?

Mr. KASSNER. Many small one store operators knowing of Burlington's interest in this area and activity in this area called Bur-

lington, and asked for their lawyers, and tried to get as much legal advice that they can get in the area from Burlington's lawyers, which they get for nothing.

Mr. WEBER. On discount outlets?

Mr. KASSNER. On that problem, yes. Single discount outlets all over the United States calling, and I give them whatever advice that we possibly can give them. The problem is that they cannot afford the litigation. Their rights may be protectable by law, but they are not protected by law.

Mr. WEBER. I do not have any more questions, Mr. Chairman.

Mr. LUKEN. Mr. Milstein, did you conclude your direct presentation?

Mr. MILSTEIN. Yes, sir.

Mr. LUKEN. We welcome the gentleman from Iowa, Mr. Berkley Bedell. Does the gentleman have any questions?

Mr. BEDELL. Thank you, Mr. Chairman.

The reason that I came down is that I was quite involved in these hearings in the last session of Congress when this matter was brought up for consideration. I have not been here for all of your testimony. But I take it from what I have heard of your testimony, that in your opinion the laws regarding vertical price maintenance are not being enforced. The net result is that those small businesses who would like to compete and use price as a method of competition are therefore restrained from doing so as effectively as they otherwise could.

Is that what you are testifying to? The reason that I ask is that Mr. Baxter is coming later.

Mr. MILSTEIN. That is our belief, sir. That it is not being enforced, and signals are going out that it will not be enforced, and we are having more and more violations of the law per se.

Mr. BEDELL. Are you saying that some small businessmen are therefore discriminated against because this is one method that they could use to compete in today's market?

Mr. MILSTEIN. All of the smaller businesses are beginning to feel pressure from the larger businesses who are in effect trying to put in a cartel pressure. The real small businesses may be forced out of business.

Mr. BEDELL. Because of an unwillingness to sell to them?

Mr. MILSTEIN. We are now more and more in a brand name economy. We have established brands. This is a form of labeling where people can identify the product's quality.

Mr. BEDELL. I think that is obvious.

Mr. MILSTEIN. If we are taking away from a merchant his ability to sell a brand that the public wants to buy, we are taking away his chance to compete.

Mr. BEDELL. He can sell a brand, but only if he sells it at the price named by the manufacturer, is that correct?

Mr. MILSTEIN. This is what they are trying to bring back. According to the law, that is not so. But when they made statements such as General Mills with their Izod alligator that they will not sell to discounters, discounters being people who sell for less, they are saying you have got to get a fixed price for this.

And it is only enforced against the smaller people. The major department stores are allowed to make a sale when they want to. But it is the smaller people who are deprived of it.

I cannot believe that any manufacturer in his right mind would turn down large amounts of business, unless they are pressured by larger stores who are saying you will lose more business if you sell to them.

Mr. WEBER. Would the gentleman from Iowa yield?

Mr. BEDELL. I would be glad to.

Mr. WEBER. The gentleman's district is just like mine. Maybe I am not seeing the big picture. By my experience in the towns in my district, which are much like the towns in your district, is that I know of a lot of retail stores that deal in name brand merchandise that are being put out of business by discount chains.

And as I look with my limited experience at my area, that is the problem and that I see in terms of the small businessmen in my district. Now you obviously have more experience with this matter than I do, and I would like to hear your perspective, because that is what seems to be happening in my communities.

That is why I tried to raise the question a few minutes ago. Are discounters really the only little guys that have a stake in this, or are there not little guys like the little clothing store operators and other people in the towns in my district and your district that may also have a stake in this?

Mr. BEDELL. I think that the gentleman makes a very legitimate point. Certain retailers would have great concern over large discounters who are selling products at times at prices which are less than what they might even have to pay for products that they are buying.

I see that. However, I also see another problem, that is that we have felt that in our society, we should have the opportunity for small business to develop, grow, and compete. If we in fact say that—and there are various creative ways for people to start businesses, and grow, and compete—and if we say that we are going to prohibit any small businessperson from using price as a method of growing and competing, I question whether that is what we really mean to have in our free enterprise society. I think that there is a serious problem if manufacturers are selling to large discount chains at prices lower than what they are selling to the general marketplace. As you know, that is illegal. I am not sure how well that part of the law is being enforced.

But the problem that I see, having been involved in manufacturing and marketing, is that there are a large number of items for which the public concern over price is much smaller than the distributing chain's concern over profits. For many manufacturers, the big concern is getting the product through the distribution machine rather than the concern of what price it is going to be sold at retail level.

Under those circumstances, if we do indeed permit vertical price maintenance in our society, then for a large number of products it seems to me that the wise thing for any manufacturer to do is to set a very high retail price for its product, and a very high margin for the distribution chain, so that they will make high profits on that item.

By so doing, especially when they have the opportunity to advertise and get brand name demand, what we will in effect do is significantly increase the price to the consumer, and really eliminate the opportunity today for what we have considered to be competition in the marketplace.

Mr. WEBER. Would the gentleman yield further?

Mr. BEDELL. I would be glad to.

Mr. WEBER. I follow your point, except it does seem to me what we see happening in the marketplace is probably not reflective of that, but reflective of the option which is available, which is for new brands to come in and compete.

I think you obviously hit on the problem though. Established brands have money to advertise. But whether it is grocery stores selling generic brand foods, or whatever you may have, it seems to me that there is an option in terms of price competition available even in the event that you permit vertical price fixing.

Mr. BEDELL. I think that opportunity is becoming less all the time. I think these people have properly identified that there was a time when we were moving toward more private branding of merchandise. It appears to me now that the movement is exactly in the opposite direction, that there is a movement more toward accepted brands of merchandise.

With the accepted brand name merchandise, the first important thing is to get your merchandise through the distribution channels. If you have a distributor who can make more money selling a branded product at this time, it is going to be tougher than the devil for anyone else to break into that market, if you have price maintenance, vertical price maintenance. Because I can tell you that distributor is interested in one thing, and that is how much money he can make handling that product. If you have vertical price maintenance, you permit them to see that there are excessive margins on their products through the distribution channel. I challenge you that as a new manufacturer, you are not going to be able to get your products into that distribution channel. Do you understand what I am saying?

Mr. WEBER. I understand. If the gentleman would yield further. What about competition on existing brands? If Levi jeans decides that they are going to fix a high margin price on their blue jeans, cannot Lee jeans or someone else, sell their product a little bit cheaper, and is there not competitive pressure in the direction of greater competition?

Mr. BEDELL. I do not think so. I think that the competitive pressure is not nearly so great at the retail level as it is at the distribution chain level, once you get a name established on most products. It varies. If you are selling sugar, I do not think that is the same thing. But if you are selling jeans or anything for which you can establish a name, and get a demand for that name, I think many times that the public thinks that a higher price indicates a better product.

Mr. WEBER. Sometimes it does.

Mr. BEDELL. The price sensitivity of those products at the retail level many times is minimal compared to the importance to the distribution chain of making a good profit on that product. That is the problem that I see with vertical price maintenance. It may not

always be true. There may be instances, as I said with sugar, where that may not be the case. I think with jeans that it probably is, in my opinion, and it seems to me that it is a dangerous thing to permit it, because in sugar, if you do not have it, it will correct itself.

Mr. LUKEN. If the gentleman would yield.

Mr. BEDELL. Yes.

Mr. LUKEN. What has not been covered perhaps in this discussion is the point of sale advertising, and the question which we addressed to the gentlemen here, the kinds of advertising that the discount store does in trading on the name of the retailer, the discounting firm.

Mr. BEDELL. I do not understand.

Mr. LUKEN. A discount store advertises to come over to our store and get this brand which Macy's is charging more for, yet Macy's has advertised, and perhaps spent a lot of money in marketing that particular product.

Mr. BEDELL. Sure.

Mr. LUKEN. I do not think that fits into the scenario you just described where the brand name of the manufacturer is established. But if there is any trading on the department store retailer, then the market that the retailer has created, and the equities become a little more confused.

Mr. BEDELL. Maybe. But it seems to me that the reason that Macy's is going to advertise is because they think that the investment in advertising is going to bring more people into their store to buy more of those products.

You are absolutely right. The discounter, if he is not going to advertise, is going to have less expense and be able to sell the product at somewhat of a lower price; that is the way that our whole system works.

Now if the manufacturer is interested in seeing that product advertised, as you probably know, it is very, very common for manufacturers to give advertising credits or allowances to help cover such advertising. If it is in the interest of the manufacturer to try to get that product advertised at the retail level, then it is not at all uncommon for the manufacturers to pick up a part of the advertising expense. I think that is perfectly legitimate and perfectly understandable.

I guess the problem I see is that we say we are going to have a system of free enterprise and free competition. It seems to me that we either have it or we do not have it. In my opinion, clearly if we say that we are going to have vertical price maintenance it is going to make it much, much more difficult for new manufacturers to enter business.

In my opinion, it is going to make it more difficult for any small businessperson who wishes to enter the marketplace using price as one of the incentives to be successful, that it is going to remove that opportunity for them. That would be my opinion, for what it is worth.

Mr. WEBER. I really am open-minded on the whole question, and the gentleman is being very helpful. But the only point that I would have to disagree with you on a little bit is that it seems to be that the whole discussion that we have here focuses exclusively on

price as a determinant of the level of competition, and it does seem to me that there are factors that are important.

Mr. BEDELL. Oh, absolutely.

Mr. WEBER. To have a policy which turns entirely on the ability of the retailer to set whatever price he chooses, while it may be important, might exclude other equally important factors. That is why I am having a little trouble with the entire argument. It seems to me that you want a policy that encourages competition and free enterprise, but does not solely fix it on price as the only thing that matters. A lot of consumers care about other things. There are other things, as you well know, go into building a business. If all you care about is price fixing, it seems to me you could leave out some of those other factors.

Mr. BEDELL. I absolutely agree with you 100 percent. The fact of the matter is that we do allow, as near as I know, free competition in those other factors. We say to one dealer if you want to have a policy of no refunds, you can have such a policy. We say to a dealer if you want to have a policy that you are going to repair anything you sell without charge for a period, we leave that up to free competition.

I have trouble when we say that price is one factor that we are not going to do that with. For price we say that the manufacturer dictates the price you have got to charge, that it has to be maintained. I absolutely agree with you completely. To me, however, that makes all the more argument why you do give people an opportunity to compete in other areas.

It would seem to me that it is pretty ridiculous for us to say that among retailers you can have a complete difference among your services. You can stay open different hours, you can have a repairman that will come and take care of things, you can do all of these sorts of things, but the thing that you cannot do any differently is to have a different price on your product. It seems to me that is a situation where it is wrong to just look at price.

Mr. WEBER. I thank the gentleman for yielding.

Mr. BEDELL. I thank you very much for being able to participate.

Mr. LUKEN. Do any of you have any comment on Mr. Muris' testimony with reference to FTC policy?

It seems to me that he took a rather neutral position in what he said today.

Mr. HOCHBERG. Well, I could not determine really what the FTC is currently doing in the RPM area. I do not think that there are any cases that they have pursued, unless very recently, from the time that the new administration came into office, but the one thing that he did say was they have a very small staff, that is why it seemed to me an anachronism. If they have a very small staff, how do they think that they can subjectively—

Mr. LUKEN. Though bigger than what David Stockman wanted a year or two ago.

Mr. HOCHBERG. All right, that is true. By the way, I think that the committee was helpful in keeping the staff that is around still there. Our regional office in Chicago was originally going to be closed, but I think it remained open.

If they have such a limited staff, why would they want to tamper with a firm area on price fixing and make that a fuzzy area? It

gives them more to have to look after and not less. That was the one major quarrel that I had. I do not agree with him on his approach.

Mr. LUKEN. I certainly agree with you that he did not offer much in the way of specifics as to what cases FTC was proceeding with, has been proceeding with, and what their policy would be with regard to those cases. Unfortunately the consumer spokesman also had a paucity of examples of inaction or action on the part of the FTC.

Mr. HOCHBERG. The only other area that he got into was when he was talking about the service, that somehow a higher price would guarantee more service. Just in the experience that I have had in 25 years in business, I do not know how you could equate getting a higher markup necessarily with more service. That extra markup could be used for a million different things, not necessarily to provide more service.

I do not like hinging the two things together: service and price. I think each particular retailer performs as much service as they think they want to perform at whatever price they think that they want to put on an item. That is not the only expense of doing business—the expense of service.

The Congressman from Minnesota had two points that he brought up that Congressman Bedell certainly answered. But if I could reply to the two items you had, which I think may be helpful a little bit, there are certain restraints of trade that are deemed reasonable, and therefore are permissible, and are judged yes or no as they come up. But historically, when they got to price that was a no-no. That was not a reasonable restraint of trade. The reason that it was not was for the reasons the Congressman mentioned.

That is an entry level that is a cornerstone to free societies: To be able to shop competitively for price. If you take that away, it is different from other restraints.

Mr. WEBER. With all due respect, you may overstate the case a little bit in saying that it is the cornerstone of a free society, but I will accept your point that it is important.

Mr. HOCHBERG. And the other point that you mentioned which was very interesting—if Levi blue jeans are fixed at a certain price, would that make it easier for someone else to come in and sell their blue jeans at a lower price.

I think that the reverse thing happens. If I am a big retailer, and I am guaranteed a certain profit on Levi, if you come in with Lee, and you want to sell me, my first question to you is can you guarantee me the profit that Levi gives me. If you will not, I will stick with Levi. What do I need your new product for?

I think that it works the opposite way of how you might think that it would operate. Based on my experience, that is the way that it goes.

Mr. LUKEN. I think that what we are going to have to do is adjourn this session. We thank the panel. We appreciate your giving so much of your time. I do believe that when we have Mr. Baxter we will want to allocate sufficient time for discussion with him.

It may be fortuitous that we will have another session. There are a number of questions that have been raised that I want to think about and prepare myself for the next session.

Mr. MILSTEIN. We wish to thank the subcommittee for the opportunity to speak and present the facts.

Mr. LUKEN. Thank you.

The subcommittee is now adjourned.

[Whereupon, at 12 noon, the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIX

ADDITIONAL PREPARED STATEMENTS SUBSEQUENTLY SUBMITTED FOR INCLUSION IN THE HEARING RECORD

PREPARED STATEMENT OF WILLIAM F. BAXTER, ASSISTANT ATTORNEY GENERAL,
ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

RESALE PRICE MAINTENANCE

Mr. Chairman and Members of the Subcommittee:

I am happy to appear today to discuss with you the views of the Department of Justice regarding resale price maintenance, including our enforcement policy and record regarding this practice.

Our position with regard to resale price maintenance involves two basic considerations: our evaluation of whether or not (and, if so, under what circumstances) resale price maintenance has harmful economic consequences inconsistent with the aims and purposes of the antitrust laws, and the proper allocation of the Department's own enforcement resources.

As to the first consideration, we believe that resale price maintenance agreements differ fundamentally in their economic consequences from price fixing agreements between competitors and other types of cartel arrangements, which serve no useful economic function whatever and are almost invariably harmful to the public interest. For this reason the courts properly hold price fixing between competitors and other cartel arrangements to be "per se" unlawful under the antitrust laws.

In contrast, resale price maintenance agreements can in a number of situations serve desirable economic ends consistent with the aims and purposes of the antitrust laws. For example, the successful marketing of a product often depends on the ability of the manufacturer to transmit information about the product to potential consumers. Point-of-sale services may be necessary so that consumers can fully understand and appreciate the qualities that make the product desirable, particularly if it is a complex product, such as a sophisticated camera, or if it embodies innovations unfamiliar to consumers. It may be desirable also to provide the consumer with extensive post-sale assistance, such as warranty services. Yet the providing of such services by particular dealers or retailers may be hampered by the phenomenon known as "free riding." The full-service retailer who provides informational and other services on a new product may discover that potential customers, after obtaining such information from this retailer, will decline to make a purchase and instead obtain the same product from a lower-priced retailer who does not provide the same services. Under these circumstances, resale price maintenance offers the manufacturer one means of assuring that retailers will in fact provide the informational and other services that the manufacturer deems necessary or desirable, without risking the loss of business to retailers who decline to do so.

Another undesirable consequence of a rule of law making resale price maintenance "per se" unlawful is that it is susceptible to abuse by dealers who have disputes with manufacturers, typically when the manufacturer seeks to terminate an unsatisfactory dealership. The dealer may claim that the manufacturer is seeking to impose resale price maintenance, and will threaten or commence a lawsuit charging a violation of the antitrust laws in the event the dealership is terminated. There may well be complaint letters in the manufacturers' files from other dealers about that particular dealer's distribution practices, including retail pricing. Such communications between a manufacturer and his distributors are virtually unavoidable; they are a part of the normal communication between a manufacturer and his distributors with regard to all matters affecting their business relationship. Yet some courts, improperly analogizing this situation to that of covert price communications between competitors, have held that such evidence is sufficient for the dealer to

maintain a claim of unlawful resale price maintenance, despite the presence of other evidence indicated the existence of wholly unrelated grounds justifying the manufacturer's decision to terminate the dealership.

These points are spelled out in greater detail in a letter dated June 18, 1982 that I sent to former Congressman Robert McClory, a copy of which I am submitting to the Subcommittee herewith, and in a brief submitted by the Department of Justice earlier this year to the Supreme Court of the United States in the case of *Monsanto Co. v. Spray-Rite Service Corp.*,¹ in which the Department urged the Court to adopt the "rule of reason" approach in adjudicating resale price maintenance cases. A copy of that brief is also submitted herewith. The Supreme Court has not yet heard arguments in that case, which is on the Court's docket for its next term, beginning in October of this year.

I want to make it clear that we reject the view that resale price maintenance should be held lawful under any and all circumstances. We recognize that resale price maintenance, just as other types of trade restraints, are susceptible to misuse through collusive arrangements between competing manufacturers, or competing distributors, and that the courts should not hesitate to strike down resale price maintenance arrangements in such contexts. In our letter to Representative McClory we have indicated some circumstances under which resale price maintenance should, in our view, continue to be prohibited.

Basically, our view is that resale price maintenance ought to be adjudged by reference to whether or not, in the context of the facts of each particular case, the practice has, or threatens to have, significant anticompetitive effects. The same legal principle, known as the "rule of reason," is currently applied by the courts in adjudicating the lawfulness under the antitrust laws of other types of vertical restraints, including territorial distribution restraints, which often are indistinguishable in economic effect from resale price maintenance.

In this connection I also wish to emphasize that a manufacturer cannot set resale prices at noncompetitive levels if his product is sold in competition with other products of the same general nature. On this point we were recently supported by an editorial in the Washington Post.

The editorial in question appeared on July 22, 1983. It was occasioned by the announcement of the proposed settlement of a private antitrust case brought by purchasers of food processors against Cuisinarts, Inc., for having set resale prices on the processors, which it manufactures.

Under a previous Administration, the Antitrust Division indicted Cuisinarts for resale price maintenance. Cuisinarts did not contest the charges and paid a fine.

Private litigation was also commenced against Cuisinarts, which led to the proposed settlement cited in the Washington Post editorial. The editorial was critical of certain aspects of the settlement not here relevant. What is relevant was the recognition by the Washington Post in its editorial of the proposition that I have just referred to, namely, that a competitive market will normally prevent a manufacturer from fixing resale prices at noncompetitive levels. On this point the Washington Post editorial, after duly noting the current Administration's views, stated as follows:

"The Reagan administration position is not without scholarly support. If the minimum price is too high, consumers won't buy, or competitive manufacturers will make a product that will undercut the original in price. That's exactly what happened to Cuisinart: other manufacturers made food processors that undersold the Cuisinart model."²

Let me now briefly address the Department of Justice's own enforcement activities in this area. A basic consideration underlying the Department of Justice's position on this matter is the belief that the Department should concentrate its enforcement resources on challenging activities that have an unequivocally harmful effect on consumers and on the economy, and where enforcement of the law by private

¹ Cert. granted, 51 U.S.L.W. 3633 (U.S. Feb. 28, 1983) (No. 82-914), lower court decision reported at 684 F.2d 1226 (7th Cir. 1982).

² While not directly germane to our subject, I also direct the Subcommittee's attention to an editorial appearing in the Washington Post on September 1, 1983, which dealt more broadly with the current policies of the Antitrust Division. This editorial was addressed to a pending court application by the Safeway Company to dissolve a long-outstanding injunction in an antitrust case prohibiting Safeway from, among other things, selling grocery products "at an unreasonably low price." The Antitrust Division has given its tentative consent to Safeway's application. Our position in that matter rests on the same general principle: a free and open market contains its own self-adjusting mechanism which in most situations, absent collusion between competing firms, will yield the competitively most desirable result and maximize consumer welfare. The recent Washington Post editorial generally supports that position.

action is often handicapped because the conspiring parties effectively conceal their wrongful conduct. Horizontal price fixing, bid rigging, and other cartel activities fall into this category. Resale price maintenance agreements in general cannot be effectively concealed by the parties, so that in most instances persons adversely affected by such an agreement will be aware of its existence and can seek relief by bringing a private lawsuit if they believe it to be unlawful. For these reasons, action by the Department of Justice in this area of business conduct is far less urgent from the standpoint of public welfare and the effective utilization of our resources than in many other areas. This consideration is applicable without regard to the substantive question of the legality of resale price maintenance.

Nevertheless, as I have publicly stated on several occasions, we are prepared to investigate, and, where appropriate, to take legal action against resale price maintenance arrangements that in our view have the type of harmful economic consequences that should not be permitted.

Recently we looked into published reports that certain retailers in the clothing industry were seeking to coerce manufacturers not to sell to discounters.³ We learned that the Federal Trade Commission had initiated its own investigation. In accordance with long-standing arrangements between the Antitrust Division and the Federal Trade Commission, we cleared the matter to the Commission.

In point of fact, it is doubtful whether resale price maintenance arrangements are common today in any industry. The current rule of law, as formulated by the courts, is that resale price maintenance is unlawful *per se* under the Sherman Act. It is also unlawful under a number of state antitrust laws. Unless and until the rule of law is modified, whether by the Supreme Court or by legislation, I doubt that many manufacturers would risk the possible legal consequences of adopting resale price maintenance.

Thus, while our view of the proper legal rule may differ from that of previous Administrations, the practical consequences probably are minimal. From 1975 through March of 1981, when I took office as Assistant Attorney General in charge of the Antitrust Division, the Department brought, according to a recent review of our records, only five cases challenging resale price maintenance, of which two cases represented respective criminal and civil proceedings against the same defendant. During the same time span, we brought some 475 criminal or civil actions involving other types of conduct.

The current rule of law regarding resale price maintenance is a creation of the Supreme Court. We have now asked that Court to reconsider the rule. There is nothing unusual in our making such a request. The Court has on a number of occasions rescinded or altered earlier court-made rules of law, in the antitrust field as in others. If the Court agrees with our arguments, it may adopt a rule that embodies the position I have stated here, or some modified version of it. Alternatively, the Court may reject our views and leave the existing rule intact. I submit that the sensible course to be followed on our part is to await the Supreme Court's decision.

Mr. Chairman, that concludes my prepared remarks. I would be happy to respond to any questions you or any member of the Subcommittee may have.

PREPARED STATEMENT OF RICHARD B. KELLY, GENERAL COUNSEL, NATIONAL ASSOCIATION OF CATALOG SHOWROOM MERCHANTISERS (NACSM)

Honorable Members of the Committee: NACSM represents the catalog showroom industry which has grown from \$1 billion to an estimated \$10 billion in revenues for 1983, by selling quality brand name consumer products at substantially less than full manufacturer's list price.

Like all retailers of a broad line of consumer products, a large percentage of the merchandise is produced by foreign manufacturers. However, as noted above, regardless of the source of goods the majority of the merchandise sold are nationally recognized brand name products.

NACSM testified at U.S. Senate hearings in 1975 in support of the repeal of the misnamed "fair trade" laws. At these hearings the multitude of witnesses condemned retail price fixing whether horizontally or vertically imposed. We know that you are fully aware that "fair trade" was repealed by the Congress at that time, and it was determined that henceforth these practices were unlawful.

We testified at House Judiciary Committee Antitrust Division Oversight hearings on March 9 of this year to call attention to efforts by the Justice Department these

³ See, e.g., *The Wall Street Journal*, August 25, 1983, at 21, col. 4; *The Wall Street Journal*, August 31, 1983, at 8, col. 2.

past two years to resurrect what is being termed "resale price maintenance," but we believe to be a euphemism for retail price fixing by manufacturers.

We believe attempts to create greater manufacturer control over their product throughout the channels of distribution to be pervasive and threatening to the concept of discount retailing. An immediate example is the efforts to permit retail price fixing by manufacturers under the rubric of permissible vertical relationships, as we recently noted in an amicus curiae brief filed with the Supreme Court of the United States in the Case of *Sprayrite v. Monsanto*.

In addition to NACSM, a variety of other organizations including the Association of State Attorneys General, forty four states and members of both Houses of Congress filed amici briefs in this private antitrust action in opposition to the Department of Justice position which supports vertical price fixing.

There has been no change in the law. No evidence has been provided to support this request to abrogate the antitrust laws and the suggestion that price fixing is a social and economic good.

As you are aware, Congressional concern was recently reflected in the U.S. House of Representatives Judiciary Authorization Bill, Section 14, unanimously reported to the floor by the full Committee, which directed that no funds authorized thereunder shall be used to "overturn or alter the per se prohibition of resale price maintenance in effect under the federal antitrust laws." H.R. Res. No. 2912, 98th Congr., 1st Sess. (1983).

The United States Senate, in a Joint Resolution now reportedly sponsored by a majority of the United States Senate has called on the Department of Justice and all other federal agencies to enforce the federal antitrust laws including the per se ban on resale price maintenance. S. Joint Res. 105, 98th Cong. 1st Sess. (1983).

We respectfully suggest that it would be appropriate for the U.S. House of Representatives to consider joining in such a resolution.

However the problem and the solution does not stop even if such a resolution were to achieve its aim.

There are other attempts to expand manufacturer control by preventing actual and potential price competition from the importation of competing products. In *Bell & Howell: Mamiya Co. v. Masel Supply Co.*, 548 F.Supp. 1063 (E.D.N.Y. 1982), app. pending before the U.S. Court of Appeals for the Second Circuit, Civ. 82-7857, an amicus curiae brief in support of defendants was filed by the U.S. Department of Justice, and argued March 28, 1983. The end result could be to make the United States an island of high prices in an otherwise worldwide sea of competitive prices.

The Courts in *Monte Carlo Shirt, Inc. v. Daewoo Int'l (America) Corp.*, 707 F.2d 1054 (9th Cir. 1983), and *Parfumas Sterns Inc. v. U.S. Customs Service, U.S.F.D.A., et al.*, 83-1116 Civ. SMA (S.D. Fla. 1983) have just rejected the position of the District Court Judge in the *Bell & Howell: Mamiya* case and the Justice Department brief in support of that district court decision thereby affirming that Customs Department Regulation, 19 C.F.R. 133, correctly interprets the Tariff Act as prohibiting the U.S. marketing affiliate of a foreign manufacturer from preventing retail price competition from imports of the manufacturer's products. Nevertheless present reported consideration by the U.S. Customs Service to change that regulation (see F.T.C. Reports—The Rose Sheet at pg. 9, 2/7/83, at pp. 6-7, 7/18/82).

For the past several months we have been speaking with the staff of individual members of the House concerning these reported recent attempts to have the U.S. Postal Service change 19 C.F.R. 333. We have also discussed this issue with the United States Department of the Treasury which has jurisdiction over the Customs Department, and with the White House and hopefully that such an "end run" around the antitrust laws will be averted.

Today we have also submitted a written statement to a U.S. Senate Committee also holding hearings on September 14, 1983. In our statement we indicate that we believe a proposed "counterfeit goods" bill could be another vehicle used by both foreign and domestic manufacturers to facilitate control over retail prices, and most specifically used to prevent consumer goods from reaching discount retailers such as catalog showrooms.

This date we have also sent a letter to the International Trade Commission to express concern that a purported increase in the importation of "counterfeit goods" not be used as another means to prevent retail price competition.

We believe it important to note before this Committee that traditional manufacturers are large corporations dealing with a multitude of retailers which are, by and large, small businesses. The catalog showroom industry consists of companies all of whom were small businesses at the time the Association was formed in 1972. Because of the innovative and successful method of retailing many of these companies have grown and prospered. However the vast majority of the membership of

NASCM consist of small companies with one, or several retail stores. Nevertheless recent steps to resurrect fair trade and provide other control over retail prices threatens all catalog showrooms and the entire retail discount industry, regardless of size. Moreover the design and effect of price and other restrictions is to keep products out of the hands of discount retailers (who provide the same services as full margin retailers) simply because they sell it to the consumer for less. The concomitant and obvious result is to raise retail prices to the consumer.

We fail to see how the best interest of the United States is served by permitting above-competitive profits to be earned by foreign manufacturers, or for that matter by American manufacturers. If price competition is to work in the American economy it should be encouraged, not discouraged at the retail level where, because of the number of competitors, it is most workable. Professor Michael Mann, Chairman of the Economics Department at Boston College and former director of the Bureau of Competition of the Federal Trade Commission, noted in the paper submitted to the House Judiciary Committee on March 9th of this year that economic analysis and scrutiny supports the lessons of all hearings on this subject, that the clear evidence of the market place is that price competition is good, not bad, and that assertions in support of "free rider" and other claims for retail price fixing are indeed frail.

We sincerely thank the Committee for the opportunity to present this statement in support of enforcement of the antitrust laws and free and open competition on the retail level.

